Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PAUL LEAHY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Petitioner was found guilty by a jury of ten counts of bank fraud under 18 U.S.C. Section 1344.

A. Was it error for the district court to instruct the jury that the measure of fraud is whether the "scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings"?

B. Was it error for the district court to refuse the defendant's proposed jury instruction that good faith was a defense to the charges in the indictment and that the burden was on the government to prove the lack of good faith where the defendant produced evidence to support the requested instruction?

C. Whether the bank fraud statute, 18 U.S.C. § 1344, requires only an act that could put the bank at risk of loss (as a divided panel of the Third Circuit, noting a "disagreement in the circuits as to whether an 'intent to harm' is required under § 1344," held below), or requires proof of intent to harm the bank (as a prior Third Circuit panel and the Second, Fifth, and Seventh Circuits have held). Petitioner incorporates the discussion of this question in the Petition for Writ of Certiorari submitted to this Court filed on behalf of co-defendant and co-appellant Dantone, Inc.

2. Whether this Court's ruling in *Libretti v. United States*, 516 U.S. 29 (1995), that criminal forfeiture does not trigger Sixth Amendment protections because a "defendant does not enjoy a constitutional right to a jury determination as to the appropriate

sentence to be imposed," which the Third Circuit (sitting *en banc* on this issue below) noted is in "tension" *with United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), can be reconciled with these recent decisions, a question the Third Circuit held must be left to this Court to decide. Petitioner incorporates the discussion of this question in the Petition for Writ of Certiorari submitted to this Court filed on behalf of co-defendant and co-appellant Dantone, Inc.

3. Whether restitution, which the Third Circuit sitting *en banc* below unanimously held was a criminal penalty (joining the Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits, but in direct conflict with the Seventh and Tenth Circuits), nonetheless falls outside the ambit of *Booker*, *Blakely*, *Ring*, and *Apprendi* (as a fractured 7-to-5 majority of the Third Circuit *en banc* held below). Petitioner incorporates the discussion of this question in the Petition for Writ of Certiorari submitted to this Court filed on behalf of co-defendant and co-appellant Dantone, Inc.

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

In addition to petitioner Paul J. Leahy, Dantone, Inc. t/a Carriage Trade Auto Auction and Timothy Smith were parties to the proceedings below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. Procedural Background 3

2. The Substantive Record 4

a. The Evidence. 4

b. The Jury Charge.. 5

REASONS FOR GRANTING THE WRIT. 6

I. The Moral Uprightness Jury Instruction Is An Incorrect And Unwarranted Expansion Of A Criminal Statute 6

II. There Is A Split In The Circuits On the Use of the Moral Uprightness Formulation . . 9

III. A Jury Instruction That "Fraud Is Any Deviation From Moral Uprightness" Has Grave Constitutional Implications 12

IV. There Is A Split In the Circuits on Whether It is Error To Deny A Defendant A Good Faith Instruction Where Supported By The Record 15

V. The Petitioner's Claims Are Well Preserved And Factually Developed In The Record 15

VI. Defining Appropriate Jury Instructions For Federal Fraud Violations Is Critical In Order To Achieve Fairness And Uniformity In Light Of The Nature Of The Statutes And Their Role In Law Enforcement 16

VII. There Are Splits In The Circuits On Whether The Bank Fraud Statute Should Be Read In The Conjunctive Or The Disjunctive And On Whether Intent To Injure The Bank Is An Element 17

VIII. This Court Should Review The Decision Of The Third Circuit To Settle The Tension Between *Libretti*'s Ruling That Criminal Forfeiture Does Not Trigger Sixth Amendment Protections In *Booker*, *Blakely*, *Ring* And *Apprendi* 20

IX. This Court Should Review The *En Banc* Ruling That Restitution, Although Criminal Punishment, Is Exempt From The Sixth Amendment 22

CONCLUSION 24

APPENDICES

A. Opinion of the United States Court of Appeals for the Third Circuit (February 15, 2006) (*en banc*) 1a

B. Opinion of the United States Court of Appeals for the Third Circuit (March 24, 2006) 51a

C. Order Amending Opinion (March 28, 2006).. 123a

D. Order on Petition for Rehearing *En Banc* (April 20, 2006) 125a

E. Judgment of the United States Court of Appeals for the Third Circuit (March 24, 2006) 127a

F. Judgment of the United States Court of Appeals for the Third Circuit (February 15, 2006). 129a

G. Order Vacating Judgment dated February 15, 2006 (May 1, 2006) 132a

H. Provisions of the Victim and Witness Protection Act, 18 U.S.C. §§ 3663 and 3664 (1992) 134a

TABLE OF AUTHORITIES

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000). ii

Blakely v. Washington, 542 U.S. 296 (2004). . ii, 1, 20

Booker v. United States, 543 U.S. 220 (2005). 4

Bradford v. United States, 129 F.2d 274, 276 (5th Cir. 1942) 6

Carpenter v. United States, 484 U.S. 19 (1987) . . 8, 9

Chatin v. Coombe, 186 F.3d 82, 89 (2d Cir. 1999). . 14

Cleveland v. United States, 531 U.S. 12 (2001) . . 8, 9

Cleveland v. United States, supra 17

Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) 7

Gregory v. United States. 12

Kolender v. Lawson, 461 U.S. 352 (1983) 13

Libretti v. United States, 516 U.S. 29 (1995). . . . i, 20

McMillan v. Pennsylvania, 477 U.S. 79 (1986). . . . 21

McNally v. United States, 483 U.S. 350 (1987) . . 8, 9

McNally v. United States, supra 17

Ring v. Arizona, 536 U.S. 584 (2002) . . . . . ii, 20

Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), cert. denied, 313 U.S. 574 (1941) 6

Smith v. Goguen, 415 U.S. 566, 575 (1974) 14

States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991) 14

United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980) 11

United States v. Booker, 543 U.S. 220 (2005). . . ii, 20

United States v. Brown, 79 F.3d 1550 (11th Cir. 1996) 12

United States v. Chenault, 844 F.2d 1124, 1130 (5th Cir. 1988) 15

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) 12

United States v. Davis, 989 F.2d 244, 246 - 247 (7th Cir. 1993) 19

United States v. Dorotich, 900 F.2d 193, 193 (9th Cir. 1990) 15

United States v. Fowler, 932 F.2d 306, 317 (4th Cir. 1991) 15

United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998) 9

United States v. Handakas, 286 F.3d 92, 107 (2d Cir. 2002) 14

United States v. Holzer, 816 F.2d 304 (7th Cir. 1987) 10

United States v. Holzer, 816 F.2d 304, 309 (7th Cir.), cert. granted and judgment vacated on other grounds, 484 U.S. 807 (1987) 12

United States v. Laljie, 184 F.3d 180, 189 (2d Cir. 1999) 19

United States v. Lanier, 520 U.S. 259, 265 n. 6 (1997) 13

United States v. Lung Fong Chen, 393 F.3d 139 (2d Cir. 2004) 15

United States v. Mutuc, 349 F.3d 930 (7th Cir. 2003) 15

United States v. Odiodio, 244 F.3d 398, 401 (5th Cir. 2001) 19

United States v. Platte, 401 F.3d 1176 (10th Cir. 2005) 15

United States v. Ribaste, 905 F.2d 1140, 1143 (8th Cir. 1990) 15

United States v. Rodriguez, 140 F.3d 163, 168 (2d Cir. 1998) 19

United States v. Serlin 11

United States v. Sprick, 233 F.3d 845, 852 (5th Cir. 2000) 19

United States v. Staples, 435 F.3d 860, 866 - 867 (8th Cir. 2006) 20

United States v. Stull, 743 F.2d 439, 455, n.7 (6th Cir. 1984), cert. denied, 470 U.S. 1062 (1985) 10

United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir.), cert. denied, 444 U.S. 994 (1979) . 7, 10

United States v. Walker, 26 F.3d 108 (11th Cir. 1994) 15

United States v. Wall, 130 F.3d 739 (6th Cir. 1997) 15

Statutes

18 U.S.C. § 1344 . . . . . 2, 3

18 U.S.C. § 1344(1) 17

18 U.S.C. § 1344(2) 17

18 U.S.C. § 982(a)(2) 3

18 U.S.C. §§ 1341, 1343 16

28 U.S.C. § 1254(1) 2

Petitioner Paul Leahy respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on February 15, 2006 (dealing with the application of the Sixth Amendment to restitution and forfeiture) and the opinion and judgment entered by a panel on March 24, 2006 (dealing with trial errors and sentencing errors).

Petitioner Paul Leahy also joins in, and incorporates by reference as if set out in full, the Petition for Writ of Certiorari filed on behalf of co-defendant and co-appellant Dantone, Inc.

OPINIONS BELOW

The Third Circuit ruled in two parts in this criminal appeal.

(1) On petitioners' *Booker* challenge to the forfeiture and restitution features of their sentences, after panel argument but before panel ruling, the Third Circuit, *sua sponte*, ordered rehearing *en banc*. The *en banc* decision of the Third Circuit, rendered on February 15, 2006, is reported at 438 F.3d 328 and is reprinted at App. 1a.[1]

(2) The panel reserved for its consideration all other issues, including the appeal of petitioners' convictions. The panel's decision, rendered together with its judgment on March 24, 2006, is reported at

[1] A judgment initially accompanied the *en banc* ruling on February 15, 2006. App. 129a. However, at that time, the appeal of defendants' convictions remained pending. The court of appeals subsequently vacated its February 15, 2006 judgment. App. 132a.

445 F.3d 634 and appears at App. 51a. The panel ruling denying petitioners' request for rehearing and rehearing *en banc* as to the issues heard by the panel is dated April 20, 2006 and appears at App 125a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 24, 2006 (App. 51a). Petitioner herein filed a timely petition for rehearing and rehearing *en banc* which the Court of Appeals denied on April 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

18 U.S.C. § 1344, Bank Fraud, provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by,

> or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 982(a)(2) states in pertinent part:

> The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate –
> (A) section . . . 1344 of this title, affecting a financial institution. . . .,
>
> shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

STATEMENT OF THE CASE

1. Procedural Background

Along with co-defendant Timothy Smith and their employer Dantone, Inc., trading as Carriage Trade Auto Auction, the Petitioner went to trial on a ten count indictment charging violations of the Bank Fraud statute, 18 U.S.C. § 1344, in the United States District Court for the Eastern District of Pennsylvania (J. Curtis Joyner, J). All three defendants were found guilty by a jury. Petitioner Leahy was sentenced to a 37-month term of incarceration, a fine of $5,000, a special assessment of $1,000, restitution in the amount of $408,970 and forfeiture totaling $418,657. All three defendants perfected timely appeals to the United States Court of Appeals for the Third Circuit raising claims of trial and sentencing error (including claims concerning the jail term imposed and restitution and forfeiture).

A panel of the Third Circuit convened oral argument on the consolidated appeals of the three defendants but, before rendering a decision, the question of whether this Co rt's decision in *Booker v. United States*, 543 U.S. 220 (2005), applied to restitution and forfeiture was referred to and considered by the court of appeals *en banc*. Following argument on the consolidated appeals of the three defendants (and two other unrelated appeals), the *en banc* court filed an opinion holding that *Booker* did not apply to restitution and forfeiture.

Later, on March 24, 2006, the panel of the Third Circuit (Fuentes, Van Antwerpen and Becker, JJ) filed an opinion rejecting the claims of trial error. However, in accordance with Third Circuit authority on harmless error and the application of *Booker* to cases in which sentence was imposed aft, and because of certain uncertainty concerning the district court's calculation of the Sentencing Guidelines, the panel remanded for resentencing.

Petitioner filed a petition for rehearing and suggestion for rehearing *en banc* on the issues of trial error.[2] On April 20, 2006, the court entered an order denying that petition. The panel decision is the subject of this Petition.

2. The Substantive Record

a. The Evidence

Petitioner and Timothy Smith were managers at

[2] Co-defendant Timothy Smith did not pursue rehearing in the Third Circuit and his case has been remanded for resentencing. Co-defendant Dantone, Inc., did pursue rehearing and has filed a Petition for Writ of Certiorari in this Court.

Carriage Trade Auto Auction, a public auction concern that, among other activities, contracted with banks to liquidate repossessed automobiles. A minimum or reserve price was arranged by the banks and Carriage Trade, constituting the lowest prices the banks would accept.

The owners of the repossessed cars were in arrears on their payments and the outstanding principle, interest and costs could exceed the amount resulting from the sale at auction. This difference, known as a "deficiency judgment," would be lodged against the owner.

In certain cases, the evidence showed, Carriage Trade diverted certain cars sent by banks and then sold the cars on its own account, either at the public auction or private auctions. The banks were told that the cars had been sold to the highest bidders at the public auction and were given documentation falsely showing that they had been purchased by a third-party auto trader. Carriage Trade would then inform the banks that the auction price was at or slightly above the minimum or reserve prices. In fact, the cars often yielded prices significantly higher than the minimum or reserve price and the difference between what was paid to the banks and actually yielded at auction was kept as profit by Carriage Trade. No evidence was presented to show whether the banks actually lost money on any particular car or whether any particular owner suffered the entry of a deficiency judgment.

b. The Jury Charge

The Court instructed the jury as follows in accordance with the Government's Request No. 10:

The fraudulent nature of a scheme is not

> defined according to any technical standards. Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light[sic] of the community.

App. 77a (emphasis added). The defendants objected to this instruction. *Id.* In addition, the court charged that fraud is limited only by human ingenuity.

Finally, the district court denied the defense request to charge the jury on good faith as a defense. The defendants requested that the Court instruct the jury that, if it found that the defendants acted in subjective good faith, the defendants must be found not guilty, with the additional requirement that proving in absence of good faith was borne by the government, beyond a reasonable doubt. App. 81a-82a.

REASONS FOR GRANTING THE WRIT

I. The Moral Uprightness Jury Instruction Is An Incorrect And Unwarranted Expansion Of A Criminal Statute

The process of distinguishing between frauds subject to civil remedies and frauds subject to criminal prosecution appears to be the genesis for the characterization that fraud is any deviation from moral uprightness. The formulation first appears in several early cases in which courts grappled with the extent of the mail fraud statute, whether it covered bribery, deprivations of intangible rights or similar cases. *See Bradford v. United States*, 129 F.2d 274, 276 (5th Cir. 1942); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574

(1941) (distinguishing "constructive frauds," which a civil equity court may remedy, from "active frauds" subject to the mail fraud statute, on the ground that the latter involves a purpose to do wrong "inconsistent with moral uprightness;" "the essential immorality" of the scheme marks the difference); *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949). Since the 1940's, the formulation of Congressional purpose has resonated in the case law as a statement of Congressional purpose in the context of purely legal discussions of statutory coverage and sufficiency of the evidence, achieving the state of a commonly used string cite in virtually every circuit.[3] No reported case includes an analysis of whether the use of the formulation in legal discourse is truly consistent with the language of the statute or Congressional intent. Notably, the Third Circuit has approved the use of the formulation as a jury instruction in reliance on its holdings approving its use in purely legal discourse. The underpinnings for the use of the statement that "fraud is any deviation from moral uprightness" for any purpose remains unexamined in reported decisions even as this phrase has metamorphized into a jury instruction.

The use of the "moral uprightness" formulation, either as a statement of statutory purpose or in the form of a jury instruction, is inconsistent with the

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[3] *United States v. Moran*, 312 F.2d 480 (1st Cir. 2002); *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003); *United States v. Shamy*, 656 F.2d 951 (4th Cir. 1981); *United States v. Fowler*, 735 F.2d 823 (5th Cir. 1984); *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979);*United States v. Hammen*, 977 F.2d 379 (7th Cir. 1992); *United States v. Johnson*, 169 F.3d 569 (8th Cir. 1999); *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980).

trilogy of cases in which this Court construed the mail fraud statute. Starting with *McNally v. United States*, 483 U.S. 350 (1987), this Court has refused to construe the mail fraud statute as a catch-all and all-encompassing prohibition on fraudulent conduct and certainly immoral behavior. In *McNally*, the Court construed the statute relatively narrowly, noting that the statute was not established to set standards for "good government," and that the statute was designed to reflect a "common understanding" that the criminal law was to punish a deprivation of items of value by trick, deceit or falsehood. Thus, far from punishing mere immoral behavior or even deprivations of other kinds of rights, the Court held that the mail fraud statute applied only to schemes to deprive victims of "money or property."

This careful statutory approach was also reflected in *Carpenter v. United States*, 484 U.S. 19 (1987), a case in which the defendants were convicted of fraudulently disclosing and manipulating information to be published in a *Wall Street Journal* column on the subject of the stock market. Once again, the Court eschewed reliance upon any broad interpretation of the mail fraud statute, nonetheless upholding the conviction on the ground that the *Wall Street Journal* had a legally enforceable and cognizable right to the confidentiality of its information, constituting its stock and trade.

Finally, in *Cleveland v. United States*, 531 U.S. 12 (2001), the Court held that a fraudulent scheme to procure video poker licenses from the state of Louisiana was not within the rubric of the mail fraud statute. Once again, a close and careful analysis of the "money or property" element of the statute led to the conclusion that a video poker license was not

property in the hands of the issuer or the recipient.

This trilogy of cases stands for the proposition that the mail fraud statute is to be parsed in accordance with the very language chosen by Congress. The statute (and others like it) is not designed to establish overall standards of "good government," fair dealing or, indeed, moral uprightness.

The "moral uprightness" formulation insinuated itself into our purely legal discourse at a time when courts were grappling with political corruption and business prosecutions that were relatively novel. The broad formulation may have had some utility, even if minimal, as the law developed in that connection. However, it is respectfully submitted that the "moral uprightness" view of the mail fraud statute is precisely what led to the need for this Court to substantially narrow and restate the very premises for the mail fraud statute in *McNally*, *Carpenter* and *Cleveland*. Thus, the use of the phrase even in legal discourse is certainly not helpful to careful legal analysis and perhaps can lead one to overbroad interpretations of the statute. Moreover, to instruct a jury that fraud is any deviation from moral uprightness is plainly in violation of the established authority of this Court.

II. There Is A Split In The Circuits On The Use Of The Moral Uprightness Formulation

There is a split in the circuits on the appropriate use and significance of "moral uprightness" as a description of Congressional intent.

The Third and Sixth Circuits have held that it is not error to instruct a jury that fraud is any deviation from moral uprightness. *See United States v. Frost*,

125 F.3d 346, 371 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *United States v. Stull*, 743 F.2d 439, 455, n.7 (6th Cir. 1984), *cert. denied*, 470 U.S. 1062 (1985). These courts cited prior circuit uses of the moral uprightness formulation as a statement of statutory interpretation as authority for its use in a jury instruction. *See id., citing United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979).

The Seventh, Tenth and Eleventh Circuits have rejected the "moral uprightness" language even as a description of Congressional intent. In *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), the court considered the appeal of a corrupt state court judge. Although the defendant's conduct was ultimately held to be within the fraud statutes, the court made the following observations about the moral uprightness formulation:

> The frequently quoted suggestion that whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the community" cannot have been intended, and must not be taken literally. *It is much too broad and, given the ease of satisfying the mailing requirement . . . would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute.*

Id. at 309 (emphasis added) (citations omitted).

The Seventh Circuit elaborated on this theme in *In the Matter of EDC, Incorporated*, 930 F.2d 1275 (7th Cir. 1991), where the underlying dispute arose out of a civil RICO suit brought by the debtors-in-

possession in a bankruptcy proceeding. On appeal the issue of whether a fraud had been committed was considered by the court. Writing for the Seventh Circuit, Judge Posner stated:

> Perhaps aware in their heart of hearts that the elements of a fraud case are missing–for the plaintiffs do not appeal from the judge's dismissal of their pendant state-law claim for common law fraud–they remind us of the *extravagant rhetoric* in which some judicial opinions interpreting the federal mail fraud and wire fraud statutes come wrapped. For example, fraud has been said to be whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *United States v. Bohonus*, 628 F.2d 1167 (9th Cir. 1980). *Such hyperbole, of which we were guilty in United States v. Serlin, must be taken with a grain of salt. Read literally it would put federal judges in the business of creating new crimes; federal criminal law would be the nation's moral vanguard.*

Id. at p. 1275 (emphasis added) (citations omitted).

Judge Posner's concerns are well-founded and resonate even in the context of legal analysis. Such "extravagant rhetoric" in instructions to a jury cause greater mischief. Because there exists no "moral uprightness" or similar language in the statutes, its use invites the creation of common law crimes and has grave implications for the separation of powers doctrine. Giving the formulation to the jury goes even further in that it permits the jury to decide what

constitutes a crime, leading to jury-made subjective legal standards.

The Tenth Circuit has rejected the formulation as a statement of statutory purpose in a decision reversing a conviction for insufficient evidence, noting that such a characterization risks creation of common law crimes. *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997).

In *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), the court reasoned as follows:

> Language from some of our earlier opinions suggests that the federal fraud statutes encompass almost any situation. In *Gregory v. United States*, for example, we wrote that fraud is deviation from conduct that is a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." 253 F.2d 104, 109 (5th Cir. 1958). . . . . *And, as the Seventh Circuit has noted, such language, "cannot have been intended, and must not be taken, literally."*

Id. at 1556, *quoting United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.), *cert. granted and judgment vacated on other grounds*, 484 U.S. 807 (1987) (emphasis added) (citation omitted).

III. A Jury Instruction That "Fraud Is Any Deviation From Moral Uprightness" Has Grave Constitutional Implications

This Supreme Court has established a level of predictability in its own analyses of the fraud statutes. The use of the "moral uprightness" formulation upsets this predictability by bringing

within the criminal sanction a vast range of conduct that Congress could not have intended, and the criminality of which defendants have no notice. Moreover, the use of this charge creates common law crimes, with dire implications for the separation of powers. *United States v. Lanier*, 520 U.S. 259, 265 n. 6 (1997) (federal crimes must be defined by Congress).

Second, the charge invites jurors to enlarge the definition of criminal conduct by measure of their personal standards of morality and fair play. Fundamentally, the formulation invites the application of purely personal concepts of what is moral or immoral, fair or unfair, standards that exist entirely within the subjective minds and hearts of the jurors. In essence then, the "moral uprightness" standard, to the extent it is a standard at all, renders a criminal fraud trial a purely normative exercise; not normative in the sense of determining whether a defendant's conduct met the standard of the law, but rather in the sense that the jury establishes its own "norm" and then applies it to the defendant's conduct. Jurors are invited to exercise their own judgments about what the community demands.

The jury instruction thus runs afoul of the due process clause because of its inherent vagueness. The void-for-vagueness doctrine first focuses on the requirement of fair notice in that it insists that a criminal statute define the crime with sufficient specificity that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352 (1983).

There is a related aspect to the void-for-vagueness

doctrine that focuses on the notion that it is unfair to delegate decision-making authority without setting forth adequate standards. Where the definition of the crime fails to give adequate guidance as to its scope, a criminal statute "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id., quoting Smith v. Goguen*, 415 U.S. 566, 575 (1974). This second vagueness inquiry is the "more important of the two" because it "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis." *United States v. Handakas*, 286 F.3d 92, 107 (2d Cir. 2002), *quoting Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999).

The jury instructions in this case violate both principles of the void-for-vagueness doctrine in that, if they reflect what the statute means, the statute fails to give notice of the breathtaking scope of its reach. Moreover, because the standards are without definition beyond implicating each juror's moral compass and sense of fairness, jurors are quite free and even invited to enforce their personal moral code. Accordingly, the instructions violate the due process clause.

IV. There Is A Split In the Circuits On Whether It Is Error To Deny A Defendant A Good Faith Instruction Where Supported By The Record

Counting the Third Circuit's holding in the case at bar, nine circuits hold that it is not error to deny a defendant a good faith instruction if the jury instructions otherwise adequately address specific intent. *States v. Dockray*, 943 F.2d 152, 155 (1st Cir.

1991); *United States v. Lung Fong Chen*, 393 F.3d 139 (2d Cir. 2004); *United States v. Fowler*, 932 F.2d 306, 317 (4th Cir. 1991); *United States v. Chenault*, 844 F.2d 1124, 1130 (5th Cir. 1988); *United States v. Mutuc*, 349 F.3d 930 (7th Cir. 2003); *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990); *United States v. Dorotich*, 900 F.2d 193, 193 (9th Cir. 1990); and *United States v. Walker*, 26 F.3d 108 (11th Cir. 1994).

In contrast, the Sixth and the Tenth Circuits hold that a fraud defendant is entitled, upon a proper evidentiary showing, to an instruction that good faith is a complete defense to a fraud charge and that the failure to so instruct is error. *United States v. Wall*, 130 F.3d 739 (6th Cir. 1997); *United States v. Platte*, 401 F.3d 1176 (10th Cir. 2005) ("We are an outlier on this issue").

V. The Petitioner's Claims Are Well Preserved And Factually Developed In The Record

The Petitioner's objection to the moral uprightness formulation and request for a good faith instruction were amply preserved and vigorously litigated in the trial court and were raised in briefing and argument before the panel of the Third Circuit. The Court of Appeals addressed the question in its opinion, which was accompanied by a dissent on the subject by the late Judge Becker.

The factual record concretely illustrates the impact (and, Petitioner believes, the prejudice) of the moral uprightness jury instruction and the lack of a good faith instruction. Petitioner's defense at trial was that he did not intend to defraud the victim banks because: 1) he believed that the banks sought

payment of the minimum or reserve price for the reposed automobiles; 2) that selling the reposed automobiles through public (or at times, private auction) was lawful; and 3) that the use of fabricated or straw names to sell the diverted automobiles was reasonably necessary and not for the purpose of defrauding the banks but rather was to hide from bidders at the auction the fact that the auction house was participating as a buyer of vehicles, a seller of diverted vehicles and as auctioneer. In short, Petitioner's defense was that he did not defraud the banks but he did participate in what were likely not morally upright practices in the operation of the auction. Thus, his defense was within the rubric of criminal conduct as defined by the trial court's instructions.

VI. Defining Appropriate Jury Instructions For Federal Fraud Violations Is Critical In Order To Achieve Fairness And Uniformity In Light Of The Nature Of The Statutes And Their Role In Law Enforcement

Various important federal criminal statutes are structured around "scheme to defraud" language, such as mail fraud/wire fraud (18 U.S.C. §§ 1341, 1343), bank fraud (§1344), securities fraud, healthcare fraud, etc. Prosecutions under these statutes comprise a large part of the case load of the federal courts.

The structure of these statutes is such that it is particularly important that the courts identify and enforce a reasonably clear definition of sanctionable behavior because that line naturally tends to drift, requiring a course adjustment from this Court. *See*

McNally v. United States, *supra*; *Cleveland v. United States*, *supra*. While fraud is often limited only by human ingenuity, and no doubt Congress has asserted an appropriate role in defining and enforcing standards of behavior, equal judicial ingenuity is required to maintain a workable, fair and ascertainable definition of criminal conduct. This petition both demonstrates the need and presents an appropriate opportunity to do so.

VII. There Are Splits In The Circuits On Whether The Bank Fraud Statute Should Be Read In The Conjunctive Or The Disjunctive And On Whether Intent To Injure The Bank Is An Element[4]

First, the courts of appeal are also divided as to whether the bank fraud statute is read in the conjunctive or the disjunctive.[5] Section 1344(1) makes it a crime to "knowingly execute[ ], or attempt[ ] to execute[ ], a scheme or artifice (1) to defraud a financial institution." 18 U.S.C. § 1344(1). Section 1344(2), joined by the word "or," states that it is a crime to knowingly execute a scheme or artifice to "obtain any of the moneys. . . or other property owned by, or under the custody of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344(2). The split among the circuits as to whether a scheme to defraud the financial institution is required for a

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[4] Petitioner joins in and incorporates the discussion of this question in the Petition for Writ of Certiorari filed by co-defendant Dantone, Inc.

[5] Compare *Thomas*, 315 F.3d at 197 - 198 (conjunctive), with the Sixth Circuit's decision in *Everett*, 270 F.3d at 991 (disjunctive).

conviction under subsection (2) has engendered a "four-sided" split because the intent split has been layered on top of the conjunctive/disjunctive issue.

Third Circuit precedent requires that the statute be read in the conjunctive so that a scheme to defraud a financial institution is always required. In this case, where trial preceded *Thomas*, the jury was instructed in the disjunctive. App. 111a. The panel majority believed the instructions were acceptable nonetheless because the district court further instructed the jury that the government must prove that the "defendants participated in the scheme to defraud with the intent to defraud." App. 66a. Judge Becker's dissent rejected this cure because, among other things, it failed to make clear that the defendant had to have, not only "intent to defraud" *someone*, but "'intent to defraud *the bank*.'" App. 112a (quoting *Thomas*, 315 F.3d at 197) (emphasis original). Judge Becker believed that this set of instructions "simply did not preclude the jury from convicting solely on the basis of subsection (2)." App. 113a. This case thus provides a superior vehicle for sorting out the contours of the *mens rea* element of bank fraud under both sections of the statute.

Second, there is a split in the circuits on the intent necessary to sustain a bank fraud conviction. The Third Circuit below noted the "disagreement in the circuits as to whether an 'intent to harm' is required under § 1344." App. 73a. The Sixth Circuit has noted that the "[c]ircuits are not in accord as to the intent required to violate § 1344."[6] The First Circuit (sitting

[6] *Everett*, 270 F.3d at 990. The Sixth Circuit in *Everett* further noted that the "Sixth Circuit precedents are also not entirely consistent." *Id.*

en banc) has observed, "there are no Supreme Court precedents that define the intent necessary for a bank fraud conviction," and there is "no consensus among the circuits on the issue."[7]

The Solicitor General has observed: "The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss."[8] "The First, Sixth, Ninth, Tenth, and Eleventh Circuits have rejected such a requirement."[9] In contrast, the "Second, Third, Fifth, and Seventh Circuits" have "held that the government must prove, as an element of the offense, either that the defendant intended to expose the bank to actual or potential loss,"[10] or "that the defendant placed the bank at risk of civil liability."[11] The Fourth Circuit's ruling in *United States v. Brandon*[12], stated that exposing the bank "to an actual or potential risk

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[7] *Kenrick*, 221 F.3d at 27.

[8] Brief for the United States in Opposition, *Wilson v. United States of America*, No. 03-304, at 7.

[9] *Id.* (citations omitted).

[10] *Id.* The Solicitor cited the Third Circuit's decision in *Thomas* for this proposition. After the panel ruling below in this case, the Third Circuit no longer falls into this category except in cases where the bank is not the target of the deception. App. 71a. The Solicitor also cited *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999), and *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998).

[11] Brief for the United States in Opposition, *Wilson*, at 7 (citing *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); and *United States v. Davis*, 989 F.2d 244, 246 - 247 (7th Cir. 1993)).

[12] 298 F.3d 307, 312 (4th Cir. 2002).

of loss" is a required element, but the Fourth Circuit "has not, as far as the government is aware, reversed a bank fraud conviction based on lack of proof of that element."[13]

It is submitted that the proper construction of the bank fraud statute clearly requires resolution by this Court.

VIII. This Court Should Review The Decision Of The Third Circuit To Settle The Tension Between Libretti's Ruling That Criminal Forfeiture Does Not Trigger Sixth Amendment Protections In *Booker*, *Blakely*, *Ring* And *Apprendi*[14]

In *Libretti v. United States*, 516 U.S. 29 (1995), this Court held that criminal forfeiture is "an aspect of sentencing" that does "not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 49. However, subsequently, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), the Court recognized substantial Sixth Amendment implications in the sentencing process. It is respectfully submitted that this Court should grant review in order to address the friction that exists between *Libretti* and its subsequent holdings, a

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[13] Brief for the United States in Opposition, *Wilson*, at 7 - 8 n.1. For a comprehensive, updated view of the circuit split concerning intent for bank fraud, *see United States v. Staples*, 435 F.3d 860, 866 - 867 (8th Cir. 2006).

[14] Petitioner joins in and incorporates the discussion of this question in the Petition for Writ of Certiorari filed by co-defendant Dantone, Inc.

friction that exists not only in the conclusions and results reached in the disparate cases, but also to address the Court's analysis.

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court established the concept of a "sentencing factor" which consists of a fact not submitted to a jury for determination but which could determine the sentence imposed by the Court. However, in *Apprendi*, the Court appeared to eschew the distinction between elements of the offense and sentencing factors and determined that the relevant inquiry is to determine the affect of the factual determination; that is, does a required factual finding expose the defendant to a greater punishment than that authorized by the guilty verdict? 530 U.S. at 494.

It is respectfully submitted that criminal forfeiture is a punitive aspect of the criminal justice system and that, in the absence of a jury finding, it is entirely judge determined. The Third Circuit necessarily felt constrained to abide by this Court's decision in *Libretti* but it is submitted that this Court and this Court alone can and should address the question of whether the Sixth Amendment applies to forfeiture.[15]

[15] It should be noted that the petitioner/defendant, along with his co-defendants in the district court, waived a right to a jury trial in connection with forfeiture; nonetheless, the issue of the burden of proof would remain in this proceeding.

IX. This Court Should Review The *En Banc* Ruling That Restitution, Although Criminal Punishment, Is Exempt From The Sixth Amendment[16]

The Third Circuit held that the Sixth Amendment protections established under *Blakely* and *Booker* do not apply to restitution, even though restitution was, in the Third Circuit's view, a matter of "punishment."

It is respectfully submitted that restitution is indeed a punitive measure (although one with certain remedial aspects) and that it fits within the reasoning and logic of this Court's decisions in *Apprendi*, *Blakely*, etc.

The concept of restitution, an issue hotly contested at a factual level in the district court below, is plainly one that is fact-bound and that increases the punishment that can be imposed on the defendant. In this case, the district court made factual findings, following substantial hearings and briefings that resulted in the imposition of a restitution order of more than $400,000. No fact relied upon by the district court was found by the jury. Rather, the district court made findings that were based upon an analysis of the amount of loss incurred in or as a result of each of the transactions in which the automobiles were diverted from the auction.

Plainly, this series of factual determinations increased the punishment to be meted out to the defendant as, in the absence of such factual findings,

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[16] Petitioner joins in and incorporates the discussion of this question in the Petition for Writ of Certiorari filed by co-defendant Dantone, Inc.

the Court would be required to impose a minimal restitution order, or no restitution sanction at all.

Accordingly, it is respectfully submitted that this Court should review the decision of the Third Circuit to address this important issue.

CONCLUSION

It is respectfully submitted that the Court should grant the petition for writ of certiorari.

Respectfully submitted:

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Appendix

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4490/03-4184/03-4542/03-4560/042912

No. 03-4490

UNITED STATES OF AMERICA,

v.

PAUL J. LEAHY,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable J. Curtis Joyner
(D.C. No. 01-cr-00260-2)

No. 03-4184

UNITED STATES OF AMERICA,

v.

JAMES C. FALLON,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable James T. Giles
(D.C. No. 02-cr-00324)

No. 03-4542

UNITED STATES OF AMERICA,

TIMOTHY SMITH,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable J. Curtis Joyner
(D.C. No. 01-cr-00260-1)

No. 03-4560

UNITED STATES OF AMERICA,

v.

DANTONE, INC.,
T/A CARRIAGE TRADE AUTO AUCTION,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable J. Curtis Joyner
(D.C. No. 01-cr-00260-3)

No. 04-2912

UNITED STATES OF AMERICA,

v.

KENNARD GREGG,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable John R. Padova
(D.C. No. 04-cr-00103)

Argued: November 1, 2005
Before: SCIRICA, Chief Judge, SLOVITER, ALITO*, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, ROSENN** and BECKER
Circuit Judges.

(Filed February 15, 2006)

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*Then Judge, now Justice, Alito was on the panel for this case but was elevated to the United States Supreme Court on January 30, 2006. This opinion is filed by quorum of the panel. 28 U.S.C. § 46(d).

**Judge Rosenn heard oral argument on this case, but passed away on February 7, 2006.

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OPINION OF THE COURT

FUENTES, Circuit Judge.

We ordered rehearing en banc in three separate appeals to determine whether the District Courts' orders of restitution and forfeiture violated defendants' Sixth Amendment right to trial by jury.

I. Background

In United States v. Paul J. Leahy, No. 03-4490, following trial, a jury found defendant Dantone, Inc. ("Dantone"), and its two senior managers, defendants Paul Leahy and Timothy Smith, guilty of engaging in, and aiding and abetting, bank fraud in violation of 18 U.S.C. § 1344.[1] Defendants' convictions stemmed from their defrauding various banks out of profits derived from Dantone's auctioning of 311 repossessed and

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[1] This case was tried together with United States v. Dantone, Inc., No. 03-4560, and United States v. Timothy Smith, No. 03-4562.

after-lease cars on behalf of the banks. At sentencing, the District Court imposed prison sentences upon Leahy and Smith and entered orders of forfeiture in the sum of $418,657 and restitution in the sum of $408,970, jointly and severally, against all three defendants. Dantone, Leahy and Smith appeal both their convictions and the orders of forfeiture and restitution.[2]

In United States v. Kennard Gregg, No. 04-2912, after being arrested and charged for twice attempting to sell counterfeit money to a government informant, defendant Gregg pled guilty to two counts of dealing in counterfeit obligations in violation of 18 U.S.C. § 473. Gregg was sentenced to six months in prison and three years of supervised release, and ordered to pay restitution to the federal government in the amount of $350. He appeals only the restitution order.

In United States v. James C. Fallon, No. 03-4184, a jury convicted defendant Fallon of one count of wire fraud in violation of 18 U.S.C. § 1341, and three counts of mail fraud in violation of 18 U.S.C. § 1343 in connection with marketing his company's Derma Peel skin treatment without FDA approval. Fallon was sentenced to 12 months in prison and ordered to pay restitution in the amount of $55,235. Fallon appeals both his conviction and the District Court's restitution order.

In these appeals, all five of the defendants – Dantone, Leahy, Smith, Gregg and Fallon – challenge their respective restitution orders on Sixth

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[2] Defendants' appeal of their criminal convictions in this case, as well as in United States v. Fallon, infra, will be addressed in separate opinions.

Amendment grounds, arguing that, in accordance with United States v. Booker, 125 S. Ct. 738 (2005), the facts underlying the orders should have been submitted to a jury and established by proof beyond a reasonable doubt. Additionally, on the same grounds, Dantone, Leahy and Smith challenge their orders of forfeiture. We called for rehearing en banc to consider three sentencing issues:

1. Whether the decision of the Supreme Court in Booker applies to forefeiture;

2. Whether orders of restitution are a criminal penalty;

3. Whether Booker applies to orders of restitution under the Victim and Witness Protection Act (the "VWPA")[3] and the Mandatory Victims Restitution

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3 The VWPA reads in pertinent part:

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title . . . , other than an offense described in section 3363A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense . . . .

(a)(1)(B)(i) The court, in determining whether to order restitution under this section, shall consider–

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. (a)(1)(B)(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

18 U.S.C. § 3663.

Act (the "MVRA").[4]

Because, in our view, restitution under the VWPA and the MVRA is not the type of criminal punishment that evokes Sixth Amendment protection under Booker, we conclude that the amount a defendant must restore to his or her victim need not be admitted by the defendant or proved to a jury beyond a reasonable doubt. As to forfeiture, based upon the Supreme Court's decision in Libretti v. United States, 516 U.S. 29 (1995), we conclude that the amount a defendant must forfeit also need not be admitted or proved to a jury beyond a reasonable doubt.

II. Forfeiture and Booker

We consider first the constitutionality of the District Court's forfeiture order in Leahy. Following trial, the District Court entered an order of forfeiture in the sum of $418,657, finding that the Government had proven by a preponderance of the evidence that this sum constituted the defendants' "proceeds" from

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[4] Passed by Congress in 1996, the MVRA augmented and partially superseded the VWPA by requiring district courts to impose restitution on defendants convicted of certain offenses without regard to their ability to pay. See 18 U.S.C. § 3663A(a)(1) ("[T]he court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .) (emphasis added). Both the VWPA and the MVRA are enforced via 18 U.S.C. § 3664, which states in pertinent part:

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

18 U.S.C. § 3664(f)(1)(A).

their fraudulent activity within the meaning of 18 U.S.C. 5 982(a)(2).[5] The Leahy defendants contend that the imposition of forfeiture by the District Court under a preponderance of the evidence standard violated their Sixth Amendment right in light of the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), and Booker.

The Leahy defendants' Sixth Amendment argument with respect to forfeiture cannot be reconciled with the Supreme Court's decision in Libretti. In that case, the defendant entered a guilty plea in the middle of trial and agreed in his plea agreement to forfeit considerable property. Libretti, 516 U.S. at 33-34. He subsequently argued that his forfeiture plea colloquy was inadequate, in part because the District Court did not explain the right to a jury determination regarding forfeiture and in part because the District Court failed to obtain his express waiver of that right. Id. at 37-38. The Supreme Court acknowledged that, pursuant to what was then Federal Rule of Criminal Procedure 31(e), a special jury verdict was required to permit an order of forfeiture.[6] Id. at 48-49. It nonetheless concluded that there was no Sixth Amendment right to a jury determination, rejecting the defendant's claim that an express description and waiver of the jury right was a

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[5] 18 U.S.C. § 982(a)(2) states in pertinent part:

The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate –

> (A) section . . . 1344 of this title, affecting a financial institution . . . .

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

necessary component of the plea proceeding:

> Without disparaging the importance of the right provided by Rule 31(e), our analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.

Id. at 49. Libretti thus flatly holds that the Sixth Amendment is not implicated in the forfeiture context. See id. at 40-41 (rejecting defendant's argument that forfeiture "is not 'simply' an aspect of sentencing, but is, in essence, a hybrid that shares elements of both a substantive charge and a punishment imposed for criminal activity").

The Leahy defendants contend that Libretti has been undercut by Blakely and Booker to such an extent that its precedential value has been eroded. Even assuming that to be true, we nonetheless note that as a Court of Appeals, we are not free to ignore the Supreme Court's holding in Libretti, nor do we possess the authority to declare that the Supreme

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[6] Former Rule 31(e) stated: "[I]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Rule 31 (e) and other procedural rules governing the forfeiture of assets in a criminal case were consolidated into a new Rule 32.2 governing "Criminal Forfeiture."

Court has implicitly overruled one of its own decisions. See United States v. Ordaz, 398 F.3d 236, 241 (3d Cir. 2005) ("[I]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.") (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

Defendants argue in the alternative that Libretti should be distinguished on the grounds that it addressed only the question of whether there exists a Sixth Amendment jury right to forfeiture determinations, not the constitutionally-mandated burden of proof, which they contend must be "beyond a reasonable doubt" after Booker. While there may be some tension between Booker and Libretti to the extent that the Libretti Court cites with approval its earlier statement in McMillan v. Pennsylvania that "[t]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact," we are not dissuaded from our conclusion that Libretti controls the forfeiture issue here. 516 U.S. at 49 (quoting McMillan, 477 U.S. 79, 93 (1986)).

We further observe that the other Courts of Appeals that have considered this issue have reached the same conclusion. See United States v. Fruchter, 411 F.3d 377, 382-83 (2d Cir. 2005) (rejecting arguments that Sixth Amendment applies to forfeiture and that Booker and Blakely require proof beyond reasonable doubt in forfeiture determinations; further holding that "Libretti remains the determinative decision"), cert. denied sub nom. Braun v. United

States, 126 S. Ct. 840 (2005); United States v. Hall, 411 F.3d 651, 655 (6th Cir. 2005) (stating that "we fail to see how Booker . . . allows us to turn our back on the Supreme Court's prior ruling in this area (Libretti)"); United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005) (holding in pertinent part that Libretti remains binding Supreme Court precedent with respect to forfeiture and Sixth Amendment) cert. denied, 126 S. Ct. 827 (2005).

For the foregoing reasons, we join our sister Courts of Appeals and hold that, even after Booker, the Sixth Amendment's trial by jury protection does not apply to forfeiture, as Libretti remains Supreme Court authority by which we are bound.[7]

III. The Nature of Restitution

Before turning to Booker's applicability to restitution under the MVRA and the VWPA, we consider whether restitution under these statutes is criminal or civil in nature. If we deem restitution to be civil, there is no Sixth Amendment concern because that Amendment's protections apply only to criminal trials. We note first that restitution combines features of both criminal and civil penalties, as it is, on the one hand, a restoration to the victim by defendant of ill-gotten gains, while it is, at the same time, an aspect of

[7] We note that Booker expressly states that 18 U.S.C. § 3544, a provision of the sentencing law that requires a district court to impose forfeiture on a defendant convicted under RICO, is still "perfectly valid." Booker, 125 S. Ct. at 764 (Breyer, J., remedial majority opinion). Although the forfeiture provision identified in Booker is not the same provision at issue in this case, "Booker itself suggests that a district court's forfeiture determination under [the RICO forfeiture statute] does not offend the Sixth Amendment." Fruchter, 411 F. 3d at 382.

a criminal sentence.

This is not the first time we have addressed this issue. In United States v. Syme, after reviewing several of our earlier cases, we stated that "[w]e consider restitution orders made pursuant to criminal convictions to be criminal penalties." 276 F.3d 131, 159 (3d Cir. 2002). Syme accordingly held that "restitution ordered under 18 U.S.C. § 3663 [the VWPA] constitutes 'the penalty for a crime' within the meaning of Apprendi." Id.; see also United States v. Edwards, 162 F.3d 87, 91 (3d Cir. 1998) (holding that restitution ordered under MVRA constitutes punishment for purpose of Ex Post Facto Clause analysis); United States v. Sleight, 808 F.2d 1012, 1020 (3d Cir. 1987) (finding that under Federal Probation Act, restitution "remains inherently a criminal penalty"); United States v. Palma, 760 F.2d 475, 479 (3d Cir. 1985) (holding that restitution ordered under VWPA is criminal penalty).

The Supreme Court has touched on this issue as well. In Pasquantino v. United States, a wire fraud case in which the MVRA applied, the Court noted:

> Petitioners answer that the recovery of taxes is indeed the object of this suit, because restitution of the lost tax revenue to Canada is required under the [MVRA]. We do not think it matters whether the provision of restitution is mandatory in this prosecution. Regardless, the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent from all of petitioners' revenue rule cases. The purpose of awarding restitution in this action is not to

> collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.

125 S. Ct. 1766, 1777 (2005) (footnote omitted and emphasis added). Pasquantino suggests that whether the restitution order being reviewed is mandatory or discretionary does not change the analysis. Moreover, and more importantly, Pasquantino clearly states that an award of restitution under the MVRA or the VWPA is a "criminal punishment."

This latter stance is consistent with earlier Supreme Court precedent. In Kelly v. Robinson, 479 U.S. 36 (1986), the Court reviewed a Connecticut restitution statute in order to determine whether a restitution order was dischargeable in bankruptcy. The Court initially observed that "[t]he criminal justice system is not operated primarily for the benefit of victims." Id. at 52. The Court went on to state that "[a]lthough restitution does resemble a judgment 'for the benefit of' the victim," it is imposed in the context of a criminal sentence and "[t]he victim has no control over the amount . . . or the decision to award" restitution. Id. Additionally, the Court noted that "the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the state and the situation of the defendant." Id. Quoting the Bankruptcy Judge who decided the underlying issue, the Court finally observed that

> [u]nlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted-in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal

sanction intended for that purpose.

Id. (citation omitted and emphasis added). In sum, the Kelly Court held that restitution granted in a state proceeding as a condition of probation could not be discharged because it constituted a criminal penalty enforced "for the benefit of" the government and did not serve primarily as "compensation for actual pecuniary loss" under § 523(a)(7) of the bankruptcy code.[8] See id. at 51-52.

Of the other Courts of Appeals that have addressed this issue, only the Seventh and Tenth Circuits have held that restitution is a civil rather than a criminal penalty. See United States v. Newman, 144 F.3d 531, 542 (7th Cir. 1998) (holding "restitution authorized by the VWPA (and mandatorily imposed under the MVRA) is not a criminal punishment for purposes of the Ex Post Facto Clause"); United States v. Nichols, 169 F.3d 1255, 1279-80 (10th Cir. 1999) (adopting Seventh Circuit's Newman holding that Ex Post Facto Clause does not bar application of restitution under

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[8] Section 523(a)(7) reads:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

. . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition . . .

11 U.S.C. § 523(a)(7).

MVRA). In contrast, the Fifth, Eighth, Ninth, Eleventh and D.C. Circuits recognize that restitution, when ordered in connection with a criminal conviction, is a criminal penalty.[9]

Based upon our reading of Supreme Court precedent, we decline to overturn our precedent in Syme and instead reaffirm our view, consistent with the view of the majority of the Circuits to have addressed this issue, that restitution ordered as part of a criminal sentence is criminal rather than civil in nature.

IV. Restitution and Booker

We next turn to whether Booker applies to orders of restitution. The Leahy defendants were ordered to pay restitution under the VWPA, and the defendants in both Gregg and Fallon were ordered to do so under the MVRA. For purposes of determining whether Booker applies to orders of restitution under these two Acts, we believe the distinction between the permissive language of the VWPA and the mandatory language of the MVRA, see supra notes 3 and 4, is

[9] See United States v. Rico Indus., Inc., 854 F.2d 710,714 (5th Cir. 1988) ("Restitution is a criminal penalty."); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997) ("We conclude an order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes."); United States v. Miguel, 49 F.3d 505, 509 (9th Cir. 1995) ("The [VWPA] also clearly indicates that restitution is a penalty available to sentencing courts regardless of other criminal penalties that may be imposed."); Creel v. Comm'r of Internal Revenue, 419 F.3d 1135, 1140 (11th Cir. 2005) ("[A]n order to pay restitution under 18 U.S.C. § 3663 [the VWPA] is a criminal-penalty rather than a civil penalty."); United States v. Bapack, 129 F.3d 1320, 1327 n. 13 (D.C. Cir. 1997) (endorsing the Second Circuit's approach in Thompson).

immaterial. See Pasquantino, 125 S. Ct. at 1777 (noting that whether restitution is mandatory or discretionary does not change government's interest in enforcing orders of restitution). The primary issue we must therefore address is whether a defendant's constitutional right to have certain facts found exclusively by a jury beyond a reasonable doubt, or admitted by the defendant, bars a judge from determining the sum of restitution he or she must pay. We hold that Booker extends no such protection to criminals under the Sixth Amendment.

A. Fact-Finding Under the Sixth Amendment

The Sixth Amendment provides that all criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury." In the series of recent decisions culminating in Booker, the Supreme Court considered in depth the respective roles of judge and jury in the context of fact-finding and criminal sentencing. The central theme of the Booker line of cases has been that facts increasing the maximum penalty for a crime must be either admitted or proven to a jury beyond a reasonable doubt. The reasoning of these cases also led to a corresponding de-emphasis in the Court's Sixth Amendment jurisprudence on the rigid classification of facts increasing penalties as either elements of a crime or sentencing factors. After Booker, the inquiry governing what facts may be found by judges now turns on the effect of the fact-finding on the defendant's punishment, rather than the fact's legislative classification.

The Court first articulated this principle in Jones v. United States, where it stated in a footnote that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. 227, 243 n.6 (1999). The Court affirmed this principle in Apprendi v. New Jersey, where it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Four years later, the Court clarified in Blakely that the relevant "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 303-04.

In addition to refining its Apprendi holding, the Blakely Court rejected the presumption that "the jury need only find whatever facts the legislature chooses to label elements of the crime, and . . . those it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge." 542 U.S. at 306. The constitutional problem with such a presumption is that it allows legislatures to subvert the Sixth Amendment jury right by terming practically any fact a "sentencing fact," thereby reducing the number of facts that need to be proven to a jury for conviction. See id. at 306-07 ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.") (emphasis in original). This concern, foreshadowed in Apprendi,[10] dovetailed with the Court's greater concern that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the

law makes essential to the punishment, and the judge exceeds his proper authority." Id. at 304 (internal citation and quotation marks omitted). Thus, the legislative labeling of a fact as an element or sentencing factor is no longer significant in determining whether it may or may not be constitutionally found by a judge. Rather, under Blakely, the central consideration is the effect a given fact may have on a defendant's maximum punishment. In short, for purposes of sentencing under Apprendi and Blakely, whether a fact is labeled a sentencing fact or an element of the offense is of no consequence.

The Booker Court confirmed the insignificance of legislative labeling in this context by asserting that "the characterization of a fact or circumstance as an 'element' or 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." 125 S. Ct. at 749 (citation omitted). More important for our purposes, the Booker Court reaffirmed the reasoning of Apprendi and Blakely and applied it to invalidate the Federal Sentencing Guidelines, holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at 756. Thus, the key inquiry in determining the

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[10] In a footnote, the Apprendi Court commented that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." 530 U.S. at 494 n.19.

applicability of Booker to an order of restitution under the VWPA or the MVRA is whether a judge's calculation of the sum a defendant must restore to his or her victim constitutes an increase in punishment exceeding that authorized by plea or jury verdict, in violation of the Sixth Amendment.

B. Restitution Does Not Exceed the Statutory Maximum

Under both the VWPA and the MVRA, when a defendant is convicted of certain specified offenses, restitution is authorized as a matter of course "in the full amount of each victim's losses." 18 U.S.C. § 3664(f)(1)(A). Hence, under a plain reading of the governing statutory framework, the restitution amount authorized by a guilty plea or jury verdict – the full amount of loss – may not be exceeded by a district court's restitution order; that is, a district court is not permitted to order restitution in excess of that amount. In imposing restitution, a district court is thus by no means imposing a punishment beyond that authorized by jury-found or admitted facts. Though post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the "statutory maximum" as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence. See Booker, 125 S. Ct. at 749 (defining "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant") (citing Blakely, 542 U.S. at 303) (emphasis in original); see also United States v. Sosebee, 419 F.3d 451, 462 (6th Cir. 2005) ("Nor does [] Booker's analysis of the Sixth Amendment affect restitution, because a restitution order for the amount

of loss cannot be said to 'exceed the statutory maximum' provided under the penalty statutes."). There can therefore be no Booker violation in the imposition of restitution under the VWPA or the MVRA.

Defendants argue that until a district court makes a factual finding as to the amount of loss, restitution is not authorized in any amount. As we read the statute, once a defendant is convicted of an offense covered by the VWPA or the MVRA, a district court must (or in the case of the VWPA, unquestionably may) order restitution, and in order to fulfill this mandate, the court must determine the amount of loss pursuant to 18 U.S.C. § 3664(f)(1)(A). Under the defendants' view, the conviction itself yields a restitution amount of zero dollars, and the factual finding of the amount of loss therefore increases the sentence beyond the maximum sum authorized by the facts, in violation of Booker. On the contrary, we see the conviction as authorizing restitution of a specific sum, namely the "full amount of each victim's loss"; when the court determines the amount of loss, it is merely giving definite shape to the restitution penalty born out of the conviction.[11] Thus,

[11] We agree with our dissenting colleagues that "the relevant inquiry is not of form, but of effect-does the required finding [of the amount of loss] expose the defendant to a greater punishment than that authorized by the jury's verdict?" McKee Dis. Op. at 12 (quoting Apprendi, 530 U.S. at 494). As we note throughout this Subsection, however, we do not believe that determining the "full amount of each victim's losses" in any way "exposes" a defendant to a greater punishment than that "authorized by the jury's verdict." Indeed, the jury's verdict automatically triggers restitution in the "full amount of each victim's losses," and under the MVRA restitution is not only "authorized" (as it undoubtedly also is under the VWPA), it is

(footnote continues)

there is no restitution range under 18 U.S.C. § 3664(f)(1)(A) that starts at zero and ends at "the full amount of each victim's losses"; rather, the single restitution amount triggered by the conviction under the MVM, or permitted under the VWPA, is the full amount of loss. For these reasons, we join the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits and hold that Booker does not apply to orders of restitution under the MVRA and VWPA.[12]

(footnote continued)
required. We therefore cannot accept our dissenting colleagues assertion that uncovering the specific sum lost by a defendant's victims amounts to exposure to a punishment greater than that authorized by a jury's verdict, as full restitution is explicitly authorized under the two Acts at issue here. This logic of course extends to defendants who plead guilty as well.

[12] See United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam) ("We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment."); Sosebee, 419 F.3d at 461 (6th Cir. 2005) ("Given existing Sixth Circuit precedent and recent decisions of the other circuits on this issue, we now conclude that Booker does not apply to restitution and, thus, that Sosebee's Sixth Amendment challenge has no merit."); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005) ("We have accordingly held that Apprendi v. New Jersey . . . does not affect restitution . . . and that conclusion is equally true for Booker."); United States v. May, 413 F.3d 841, 849 (8th Cir. 2005) ("[S]everal circuits have affirmatively rejected the notion that Apprendi, Blakely, or Booker affect the manner in which findings of restitution can be made . . . . These cases are persuasive."); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005) ("In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by Booker."); United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005) (noting that "Blakely and Booker do not apply to restitution" because "[i]n the Tenth Circuit, restitution is not a criminal punishment") (citations omitted).

This conclusion is consistent with our view that orders of restitution have little in common with the prison sentences challenged by the defendants in Jones, Apprendi, Blakely and Booker. In those cases, the Supreme Court was faced with "exceptional" and "enhanced" sentences that added anywhere from two to ten years to the prison terms authorized by the facts found by the jury or pled to by the defendants. See Blakely, 542 U.S. at 299; see also Booker, 125 S. Ct. at 747 n.1. In contrast, the restitution ordered in Leahy, Gregg and Fallon was explicitly authorized by the defendants' pleas and convictions, and merely required the defendants to return property and proceeds obtained as a result of the offense of conviction.

Restitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct. In this sense, even though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged. Rather, restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner. In these circumstances, we do not believe that ordering a convicted defendant to return ill-gotten gains should be construed as increasing the sentence authorized by a conviction pursuant to Booker.[13]

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[13] We recognize, of course, that the key question under the Booker analysis is whether the judicial fact-finding required by the VWPA and the MVRA exposes a defendant to greater punishment than that authorized by a jury verdict or guilty plea. As discussed above, we hold that an order of restitution based on such fact-finding does not violate a defendant's Sixth Amendment rights.

V. Conclusion

For the foregoing reasons, we conclude that restitution under the VWPA and the MVRA is a criminal penalty and that the Sixth Amendment right to jury determinations of certain facts as articulated in Booker does not apply to forfeiture or to orders of restitution imposed as part of a criminal sentence under those two statutes.

United States v. Paul J. Leahy

United States v. Kennard Gregg

United States v. James C. Fallon

Nos. 03-4184/03-4490/03-4542/03-4560/04-2912

SLOVITER, Circuit Judge, concurring.

I approve and join Parts I. and II. of the majority opinion. I join in the judgment of Parts III. and IV. While I believe that Judge McKee's dissent has much to commend it, in the last analysis, I join the majority because the majority opinion persuades me that restitution is not a punishment governed by the Sixth Amendment.

United States v. Paul J. Leahy, et al.

United States v. Kennard Gregg

United States v. James C. Fallon

Nos. 03-4184, 03-4490, 03-4542, 03-4560, and 04-2912

FISHER, Circuit Judge, with whom Judge BARRY joins, concurring in part in the judgment.

I approve and join in Parts I, II, and III of the majority opinion. I concur only in the judgment as to Part IV. I would base our holding that the imposition of restitution did not violate the Sixth Amendment right to a jury trial solely on the conclusion that restitution is not the type of criminal penalty to which the right to a jury trial attaches. As the majority opinion correctly notes, "orders of restitution have little in common with the prison sentences challenged by the defendants in Jones, Apprendi, Blakely and Booker." Maj. Op. at 19. The issue of restitution was not before the United States Supreme Court in any of those decisions, and the Supreme Court gave no indication in those decisions that the right to a jury trial applies to any form of criminal penalty other than imprisonment. Accordingly, I would not reach – and do not join – the majority's conclusion that restitution orders do not constitute an increase in punishment beyond the "statutory maximum" for the offense.

United States v. Paul J. Leahy, et al.

United States v. Kennard Gregg

United States v. James C. Fallon

Nos. 03-4184, 03-4490, 03-4542, 03-4560, and 04-2912

McKEE, Circuit Judge. Concurring in part and dissenting in part with Judges RENDELL, AMBRO, SMITH, and BECKER joining.

Given the Supreme Court's holding in *Libretti v. United States*, 516 U.S. 29 (1995), I agree that a judicial determination of the amount of forfeiture when imposing a criminal sentence does not violate the Sixth Amendment right to a jury trial. Although I find it difficult to reconcile *Libretti* with the Court's subsequent decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005), any tension between *Libretti* and those cases must be resolved by the Supreme Court, as the majority explains. *See* Maj. Op. at 9 (citing *United States v. Ordaz*, 398 F.3d 236, 241 (3d Cir. 2005)). I therefore join Section II of the majority opinion. However, for the reasons set forth below, I do not agree that a judge can determine the amount of restitution under either the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, or the Victim Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, without violating the Sixth Amendment. Accordingly, I respectfully dissent from Section IV of the majority opinion (captioned, "Restitution and *Booker*").

I.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court stated, "any fact (other than a prior

conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (citation omitted). The Court later characterized this as a "bright-line rule." *See Blakely* 542 U.S. at 303.

In *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002), we held that "restitution ordered under 18 U.S.C. § 3663 [the VWPA] constitutes 'the penalty for a crime' within the meaning of *Apprendi*." We therefore had to determine "whether the . . . restitution order increased beyond the statutory maximum the penalties that Syme faced." *Id.* "If so, the [restitution] order violated *Apprendi*." *Id.* We held that *Apprendi* did not apply because the VWPA authorizes restitution as part of the criminal sentence that is imposed upon conviction, and because the statute "does not specify a maximum amount of restitution that a court may order." *Id.* We reasoned that the VWPA "provides guidelines that a sentencing judge may use to determine the amount of restitution, but does not prescribe a maximum amount." *Id.* We concluded that "[t]he *Apprendi* rule does not apply to restitution orders . . . because *Apprendi* applies only to criminal penalties that increase a defendant's sentence 'beyond the prescribed statutory maximum.'" *Id.* (quoting *Apprendi*, 530 U.S. at 490).

However, the Court decided *Blakely* after we decided *Syme*. *Blakely* clarified that "statutory maximum" for Sixth Amendment purposes is not the maximum sentence prescribed for a given offense. Rather, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*,

542 U.S. at 303 (emphasis in original). The Court clarified further by explaining: "In other words, the relevant 'statutory maximum' [for Sixth Amendment purposes] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* (emphasis in original). That definition of "statutory maximum" fatally undermines our analysis in *Syme*, and it is why I cannot agree with the majority's conclusion that the Sixth Amendment does not apply to orders of restitution.

A.

In *Blakely*, the Court reasoned that the right to a jury trial "is meant to ensure [the people's] control in the judiciary." *Id.* at 306. The Court explained that requiring any fact (other than a prior conviction) that increases the sentence beyond that authorized by the jury's verdict alone to be proven to the jury "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of a jury trial." *Id.* at 305. "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly* from the jury's verdict." *Id.* (emphasis added). The Court explained that those who "would reject *Apprendi* are resigned to one of two alternatives." *Id.* The first is that the jury need only find facts the legislature labels as "elements of the crime." This alternative would allow the judge to find facts which are tantamount to sentencing factors, whether or not they result in an increase in punishment. *Id.* However, this reduces the jury's findings to "a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 307. The second alternative is that "legislatures may establish legally essential sentencing factors *within limits* – limits

crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.'" *Id.* (emphasis in original). This means that "the law must not go *too far* – it must not exceed the judicial estimation of the proper role of the judge." *Id.* (emphasis in original). However, "[w]ith *too far* as the yardstick, it is always possible to disagree with such judgments and never refute them." *Id.* at 308 (emphasis in original). "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out the role of the jury." *Id.*

The bright-line rule of *Apprendi* ensures that punishment will only be imposed in a manner that is consistent with the Sixth Amendment. It ensures that "the judge's authority to sentence derives wholly from the jury's verdict." *Id.* at 306. Thus, "every defendant has a *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in original). In *Booker*, the Court reaffirmed that the Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" *Booker*, 125 S. Ct. at 749.

The *Booker* Court explained that the sentencing scheme at issue in *Blakely* ran afoul of the Sixth Amendment precisely because it "violated the defendant's right to have the jury find the existence of any particular fact that the law makes essential to . . . punishment." *Id.* (internal quotation marks omitted). The judge was able to impose a sentence greater than that authorized by the jury's verdict *alone* merely by finding additional facts. *Id.* As a result, "the judge, not the jury . . . determined the upper limits of sentencing,

and the facts determined were not required to be raised before trial or proved by more than a preponderance." *Id.* at 751.

Here, the majority pirouettes around *Apprendi*'s bright-line concept of "statutory maximum" ignoring the Court's definition of that term while putting a favorable "spin" on restitution. Restitution, we are told, is "not the type of criminal punishment that evokes Sixth Amendment protection under *Booker*." Maj. Op. at 7. While conceding that restitution is a criminal sanction, the majority emphasizes that "orders of restitution have little in common with . . . prison sentences." Maj. Op. at 19. We are reminded that "[r]estitution combines features of both criminal and civil penalties." Maj. Op. at 10-11. However, that focus obfuscates the inquiry and sidesteps the analysis required by *Blakely*.

B.

In *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), the Court discussed the nature of an order of restitution. There, the defendants were charged with wire fraud arising from a scheme to smuggle liquor into Canada to avoid that country's alcohol import taxes. They challenged the prosecution, arguing that the government "lacked a sufficient interest in enforcing the revenue laws of Canada." *Id.* at 1770. The argument arose from the fact that restitution of Canada's lost tax revenue was required by the MVRA. The Court rejected the defendants' argument, stating: "The purpose of awarding restitution in this action [was] not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct." *Id.* at 1777. Foreign tax collection was only incidental to the criminal prosecution. The primary objective of the

prosecution was "deterrence and punishment of fraudulent conduct." *Id.* Restitution furthered that objective even though it also made the victim whole. Thus, in *Syme*, we correctly concluded: "restitution ordered under [the VWPA] constitutes the penalty for a crime within the meaning of *Apprendi*." Maj. Op. at 11 (quoting *Syme*, 276 F.3d at 159).

Here, no less than in *Pasquantino*, whatever compensation results from the defendants' prosecution is merely incidental to their criminal prosecution and sentence. The primary objective of these criminal prosecutions is clearly "deterrence and punishment" of criminal conduct, not ensuring compensation for the victims.

As the majority recognizes, this view of restitution is also required by the Supreme Court's earlier decision in *Kelly v. Robinson*, 479 U.S. 36 (1986). *See* Maj. Op. at 12. In *Kelly*, the Court had to decide if restitution imposed as part of a state criminal sentence was dischargeable in bankruptcy.[14] In resolving that inquiry, the Court noted that restitution, "[u]nlike traditional fines, . . . is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused." *Kelly*, 479 U.S. at 52. However, in rejecting the defendant's contention that restitution was subject to discharge under Chapter 7, the Court explained:

> The criminal justice system is not operated primarily for the benefit of victims but for the benefit of society as a whole. . . . Although restitution does resemble a judgment "for the

[14] 11 U.S.C. § 523(a)(7) exempts from discharge any condition a state criminal court imposes as part of a criminal sentence.

> benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Id.

Ignoring their own references to *Pasquantino* and *Kelly*, Maj. Op. at 11-12, the majority declares that "restitution is, *at its essence*, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct." Maj. Op. at 19 (emphasis added). That view of restitution ignores the Supreme Court's pronouncement that "[t]he purpose of awarding restitution . . . is not [to compensate the victim], but to mete out appropriate criminal punishment for that conduct." *Pasquantino*, 125 S. Ct. at 1777. That view of restitution is also inconsistent with the bright-line rule of *Apprendi*.

By ignoring that bright-line rule and redefining restitution's "essence," the majority is able to proclaim that "even though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." Maj. Op. at 19. My colleagues state "restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner." Maj. Op. at 19. The pirouette comes full circle once my colleagues conclude: "[i]n these circumstances, we do not believe that ordering a convicted defendant to return ill-

gotten gains should be construed as increasing the sentence authorized by a conviction pursuant to *Booker*." Maj. Op. at 19.

However, that is not the question. The issue is not whether returning "ill-gotten gains should be construed as increasing the sentence authorized by a conviction." Maj. Op. at 19. Rather, the question is whether the verdict "*alone*" allows the judge to impose restitution with no additional finding of fact. Obviously, it doesn't. Notwithstanding the jury's verdict, no restitution can be imposed absent a judicial determination of the amount of loss. The fact that the statute "*require[s]*" the judge to find the amount of restitution, *see* Maj. Op. at 17 n. 11, does not free the restitution order from the inescapable Sixth Amendment pitfall created when the judge, and not the jury, makes the finding. "The dispositive question . . . 'is one not of form, but of effect.' If a State makes an increase in a defendant's punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 2428, 2439 (2002) (quoting *Apprendi*, 530 U.S. at 494; internal citations omitted).

II.

The majority believes that a defendant's conviction for specified offenses authorizes restitution "as a matter of course 'in the full amount of each victim's losses.'" Maj. Op. at 16 (quoting 18 U.S.C. § 3664(f)(1)(A)). Thus, according to my colleagues, the subsequent sentence of restitution "by no means impose[s] punishment beyond that authorized by the jury-found facts. Though the post-conviction judicial fact-finding determines the amount of restitution a

defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." Maj. Op. at 17. However, that analysis ignores the very meaning of "statutory maximum" and the bright-line rule of *Apprendi* that the Court erected to ensure the proper role of judge and jury.

To reiterate, "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original). The fact that the jury's verdict authorizes restitution "in the full amount of the victim's loss" by no means allows any restitution to be imposed at all "*without* any additional findings." The jury's verdict allows the judge to make the additional finding, but restitution cannot be ordered on the basis of the jury's verdict *alone*.

A.

The majority's analysis requires that we accept the proposition that an order of restitution rests upon the jury's verdict *alone*, even though no restitution can be imposed until the judge determines the amount of loss. We must also accept that adding a set dollar amount of restitution to a sentence does not "enhance" the sentence beyond that authorized by the jury's verdict alone. I suspect that a defendant who is sentenced to a period of imprisonment and ordered to pay restitution

in the amount of $1,000,000 would be surprised to learn that his/her sentence has not been enhanced by the additional penalty of $1,000,000 in restitution. "*Apprendi* held[] [that] every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313 (emphasis in original). Determining the amount of loss is "legally essential" to an order of restitution.

Yet, my colleagues agree, as they must, that, for Sixth Amendment purposes, "the 'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303 (emphasis in original). They seek to avoid the logical consequence of that rule by suggesting that additional facts required to impose the penalty of restitution are not really "additional facts" at all. However, the Supreme Court has rejected the distinction required by the majority's analysis.

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact [i.e. the amount of loss] . . . one of several specified facts . . . or any aggravating fact . . . , it remains the case that the jury's verdict alone does not authorize the sentence.

Id. at 305. I therefore cannot accept the majority's attempt to suggest that restitution is "not really" additional punishment. *See* Maj. Op. at 19 ("Restitution is, at its essence, a restorative remedy . . . .").

In *Blakely*, "[t]he application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of any particular fact that the law makes essential to his punishment."

Booker, 125 S. Ct. at 749 (discussing *Blakely*) (internal quotation marks omitted). The judge there "was *required* to find additional facts in order to impose the greater . . . sentence." *Id.* (emphasis in original). Similarly, the sentencing judges in the cases consolidated here were required to find the additional fact of the amount of loss. Thus, as in *Booker*, the effect of these restitution orders is to impermissibly "increase the judge's power and diminish that of the jury." *Id.* at 751.

My colleagues claim that the conviction alone authorizes restitution in an undetermined amount, and that the judicial determination of loss "*merely* [gives] shape to the restitution penalty born out of the conviction." Maj. Op. at 17 (emphasis added). That hairsplitting is analogous to the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" *Apprendi*, 530 U.S. at 494. "[T]he relevant inquiry is one not of form, but of effect -does the required finding [of the amount of loss] expose the defendant to a greater punishment than that authorized by the jury's verdict?" *Id.* Requiring facts that increase the sentence to be proven to a jury is "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Booker*, 125 S. Ct. at 752. Restitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed.[15]

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[15] The majority's view that "[i]n imposing restitution, a district court is . . . by no means imposing a punishment beyond that authorized by jury-found or admitted facts" is fallacious. To demonstrate that the maximum amount of restitution authorized by the conviction is $0, and any increase beyond that figure requires the District Court to make additional findings of fact, we offer the following. *(footnote continues)*

(footnote continued)

What, exactly, is the amount of loss? When the judge says to the defendant, "I order you to pay restitution in the amount of ____," what does the judge use to fill in the blank? Certainly it is not enough to say "I order you to pay restitution in the full amount of the victim's loss"; we suspect that the victim might be disappointed with the size of the check he ultimately receives under such a scenario. For this reason, the judge must order restitution *in a specific amount*, and in order to do so, he or she must make *a factual determination* of the size of the victim's loss. It is this factual determination, and not the simple act of conviction, that determines the maximum award that may be imposed. That is why, in this case, the District Court did not order restitution "in the full amount of the victim's loss"; instead, it ordered restitution in the amount of $408,970 for Leahy, $55,235 for Fallon, and $350 for Gregg.

Of course, the determination of "the full amount of the victim's loss" plainly is an "additional finding." So, the majority's argument requires us to accept that district courts can somehow impose restitution "in the full amount of the victim's loss" without making a factual determination as to what that amount is. We have many fine district judges in this Circuit, but we know of none capable of this feat.

The majority fails to realize that without additional findings, the maximum sentence that may be imposed in the form of restitution is $0. To see why this is true, consider a typical first-time defendant convicted of possession with intent to distribute in violation of 18 U.S.C. § 841 (a)(1). For simplicity's sake, we will focus solely on the issue of drug quantity, and assume that the jury has found that the substance at issue is cocaine and that no other sentencing elements (such as criminal history) are relevant. Under the Guidelines, the District Court could impose a sentence of 10-16 months based solely on the fact of conviction, without making any more factual findings. If the District Court later determines that the defendant possessed more than 25 grams of cocaine, then it may, in accordance with the Guidelines, impose a higher sentence.

In truth, the determination of drug quantity in this scenario is

(footnote continues)

The majority finds some comfort in being able to "join[] the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits" in holding "that *Booker* does not apply to orders of restitution under the MVRA and VWPA."

(footnote continued)

precisely equivalent to the determination of the victim's loss in the restitution example. In the same way that conviction authorizes a judge to impose restitution "in the full amount of the victim's loss," so too does conviction for possession with intent to distribute under 18 U.S.C. § 841(a)(1) authorize the judge to impose "the appropriate Guidelines sentence of incarceration, based on the quantity of the drugs possessed by the defendant."

The only real difference between the two situations is that a judge imposing restitution starts from a baseline of $0 and then makes a determination of fact regarding the actual amount of the victim's loss, while a judge imposing incarceration for violating § 841 (a)(1) starts from a baseline of 10-16 months and then makes a determination of fact regarding the actual quantity of drugs sold. Just as the maximum sentence under § 841 (a)(1) without additional findings is 10-16 months, the maximum amount of restitution without additional findings is $0.

Of course, the restitution statutes actually authorize or require restitution in the full amount of the victim's loss-just like the Sentencing Guidelines require incarceration in accordance with the quantity of drugs the defendant actually sold. The only relevance of the 10-16 month range is that it is the penalty that may be imposed *without* any additional findings—just like the maximum award of restitution that may be imposed *without* any additional findings is $0. In both cases, however, the judge is required to make additional findings which will increase the sentence beyond the maximum authorized solely by conviction. The distinction that the majority draws between the pre-*Booker* Sentencing Guidelines and restitution under the VWPA or MVRA simply is not a meaningful one. In both cases, the judge makes factual determinations that increase the maximum penalty that may be imposed. For this reason, both schemes run afoul of the Sixth Amendment.

Maj. Op. at 18. However, before *Booker* was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that *Apprendi* does not apply to the federal sentencing guidelines.[16] Moreover, the cases the majority cites from other circuit courts are not very helpful.

In *United States v. Sosebee*, 419 F.3d 451 (6th Cir. 2005), the court rejected a claim that orders of restitution are subject to the Sixth Amendment by concluding that "restitution statutes do not specify a statutory maximum," *id.* at 461, without ever considering *Blakely*'s definition of that term or even discussing *Blakely* as part of its Sixth Amendment analysis. In addition, *Sosebee* attempts to distinguish *Booker* by referring to the fact that "restitution orders are authorized by statute." *Id.* at 462. However, the fact that restitution arises from statute rather than a guideline is obviously irrelevant to a Sixth Amendment analysis. Constitutional rights are not subject to legislative repeal. *See Ring*, 536 U.S. 584. As noted at the outset, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust the government to mark out

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[16] United States v. Goodine, 326 F.3d 26, 27 (1st Cir. 2003); *United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002); *United States v. Cepero*, 224 F.3d 256, 268 n.5 (3d Cir. 2000); *United States v. Cannady*, 283 F.3d 641, 649 n.7 (4th Cir. 2002); *United States v. Randle*, 304 F.3d 373, 378 (5th Cir. 2002); *United States v. Harper*, 246 F.3d 520, 530 (6th Cir. 2001); *United States v. Cole*, 298 F.3d 659, 663 (7th Cir. 2002); *United States v. Mora-Higuera*, 269 F.3d 905, 911 (8th Cir. 2001); *United States v. Ochoa*, 311 F.3d 1133, 1135 (9th Cir. 2002); *United States v. Wilson*, 244 F.3d 1208 (10th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001); *United States v. Fields*, 251 F.3d 1041, 1043 (D.C. Cir. 2001).

the role of the jury." *Blakely*, 542 U.S. at 308.[17]

The analysis in *United States v. George*, 403 F.3d 470 (7th Cir. 2005), is driven by the fact that the court considers restitution a civil penalty. The court states: "There is no 'statutory maximum' for restitution; indeed, it is not a criminal punishment but . . . a civil remedy administered for convenience by courts that have entered criminal convictions . . . ." *Id.* at 473.

In *United States v. Garza*, 429 F.3d 165, 169-70 (5th Cir. 2005), the Court of Appeals for the Fifth Circuit also concluded *Booker* does not directly affect the MVRA because it is a statute (as opposed to a guideline), without attempting to explain why that "distinction" is relevant to a Sixth Amendment analysis. With no analysis, the court proclaims that judicial fact-finding for restitution does not violate the Sixth Amendment. The court then states that "even if there were *Booker* error in the restitution order, any error would certainly not be plain under current law." *Id.* at 170. The court used the plain error standard because the defendant had not objected to the order of restitution. The court does not cite *Blakely* in that part of its analysis, nor does it explain why a violation of a Sixth Amendment right to a jury finding would not affect substantial rights as required for plain error under *United States v. Olano*, 507 U.S. 725 (1993).

In *United States v. May*, 4 13 F.3d 84 1, 849 (8th Cir. 2005), the Court of Appeals for the Eighth Circuit concluded "that restitution does not have a 'statutory maximum.'" The court also concluded that, even if

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[17] Sosebee also relies in part upon our holding in *Syme*. *See* 419 F.3d at 461. As I have already explained, our decision there cannot survive *Blakely*.

there had been a *Booker* error, it could not be plain because neither the Supreme Court nor the Eighth Circuit has held that *Booker* applies to restitution. *Id.* However, here again, there is no discussion of what is meant by "statutory maximum" for purposes of the Sixth Amendment.

In *United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005), the defendant challenged imposition of costs and restitution, but the challenge to restitution rested on her claim that the court erred in relying upon the *intended* loss rather than the actual loss. With no discussion of *Blakely*, the court decreed: "[i]n contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*." The court relied upon *United States v. DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004), and *United States v. Chavez*, 627 F.2d 953, 957 (9th Cir. 1980), in reaching this conclusion. However, *Chavez*, was decided in 1980, long before *Apprendi* and *Blakely*. *DeGeorge*, like *Bussell*, states only that restitution orders pursuant to the VWPA are "unaffected by *Blakely*." The court in *DeGeorge* simply cited a 1994 Ninth Circuit case which stated that "restitution determinations under the VWPA are quite different from sentencing determinations under the Sentencing Guidelines." *DeGeorge*, 380 F.3d at 1221 (internal citation omitted). Moreover, the court in *DeGeorge* specifically stated that, because it was reversing on other grounds, "we will not address the *Blakely* issues here; instead, DeGeorge is free to raise them on remand." *Id.* at 1220. Thus, *DeGeorge* does not advance the Sixth Amendment inquiry in *Bussell*, even though the latter court relies upon it.

The final case cited by the majority in support of its

restitution determination is *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005). There, in its brief discussion of restitution under *Blakely* and *Booker*, the court stated: "[i]n the Tenth Circuit, restitution is not criminal punishment." *Visinaiz*, 428 F.3d at 1316. Accordingly, *Visinaiz* does not further the majority's inquiry because the majority properly views restitution as a *criminal* punishment as required by *Pasquantino* and *Kelly*.

III.

In attempting to distinguish restitution from imprisonment, the majority notes that *Apprendi* and its progeny all involved rather substantial increases in terms of incarceration based upon judicial fact-finding. The majority notes that, "[i]n those cases, the Supreme Court was faced with 'exceptional' and 'enhanced' sentences that added anywhere from two to ten years to the prison terms authorized by the facts found by the jury or pled to by the defendants." Maj. Op. at 19.

I agree that this distinction has some merit. For example, the defendant in *Blakely* "was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed." *Blakely*, 542 U.S. at 313. However, nothing in the Supreme Court's analysis in *Apprendi* or its progeny (including *Blakely*) suggests that the Supreme Court would tolerate this distinction or that the Sixth Amendment allows it. In fact, the Court says quite the opposite in holding that the Sixth Amendment applies to *any* fact-finding that increases the sentence beyond that which could be imposed based upon the jury's verdict alone. As I have already explained, *Apprendi* requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The majority limits that rule to increases in terms of imprisonment. However, that limitation requires us to turn a blind eye to the meaning of "statutory maximum." It merits repeating yet again that "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original).[18]

The Court could easily have limited its Sixth Amendment analysis by defining "statutory maximum" as the maximum sentence of incarceration or confinement (rather than punishment) that a judge may impose on the basis of the verdict alone. Given the backdrop of *Pasquantino* and *Kelly*, the Court would almost certainly have used language that would have limited the reach of its analysis to enhancements

[18] The Court emphasized this language for a reason, and I cannot deemphasize it as readily as the majority's analysis requires. Even if we could somehow assume that determining the amount of loss did not expose a defendant to greater punishment, determining the amount of loss would still be essential to the restitution order. Therefore, restitution does not rest "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Rather, it rests substantially on the judicial determination of the amount of loss. It is therefore somewhat misleading to suggest that the "key question under the *Booker* analysis is whether the judicial fact-finding required by the VWPA and the MVRA exposes a defendant to greater punishment than that authorized by a jury verdict or guilty plea." Maj. Op. at 19, n. 13. Even assuming *arguendo* that a defendant is not exposed to a greater punishment, his/her sentence is still based on facts not found by a jury or admitted in a plea.

that result in a deprivation of liberty if the Court intended to restrict the Sixth Amendment as the majority does. The Court could also have limited the reach of *Apprendi* to any fact that "substantially" increases the sentence. The Court did neither.

I submit that it is difficult to read the majority's attempt to rationalize the limits it places on the Court's Sixth Amendment jurisprudence without concluding that, in essence, the majority essentially believes that applying *Apprendi* to orders of restitution simply stretches the Sixth Amendment too far. However, *Blakely* specifically rejects that limitation by noting that the Framers would not have left the "definition of the scope of jury power up to judges' intuitive sense of how far is *too far*." *Blakely*, 542 U.S. at 308. Rather, the Court created a bright-line rule. *Id.* Pursuant to that rule, *any* factual finding (other than a prior conviction) that increases the defendant's punishment beyond that authorized by the jury's verdict alone must be proven beyond a reasonable doubt to a jury or admitted by the defendant. Our decision today cannot be reconciled with that rule.

I do, of course, realize that the precise issue of the application of the Sixth Amendment to restitution orders was not before the Court in *Apprendi* or its progeny. It is therefore quite possible that the Court never considered the precise issue that we are deciding when it crafted those landmark opinions. Nevertheless, given the Court's recent jurisprudence, we are not at liberty to rationalize a distinction between punishment in the form of incarceration on the one hand, and punishment in the form of restitution on the other. Given the clear pronouncements in *Apprendi* and *Blakely*, any such

distinction must be drawn by the Court in the first instance, and not by us. *See Ordaz*, 398 F.3d at 241.

A sentencing court may impose restitution under the VWRA, and it *must* do so under the MVRA. I agree with the majority's conclusion that "the distinction between the permissive language of VWPA and the mandatory language of the MVRA is immaterial." Maj. Op. at 14. Under neither statute does the restitution order rest "*solely*" upon the jury's verdict. A finding of loss necessarily is a condition precedent to an order of restitution, and under both statutes, it is the judge who makes the finding. As I have explained, the imposition of this additional criminal penalty based on a fact not found by a jury violates the Sixth Amendment. Therefore, I respectfully dissent from the majority's conclusion that the Sixth Amendment does not apply to orders of restitution.

United States v. Paul J. Leahy

United States v. Kennard Gregg

United States v. James C. Fallon

Nos. 03-4184/03-4490/03-4542/03-4560/04-2912

AMBRO, Circuit Judge, concurring and dissenting in part

I write separately to note my view that both the majority and dissenting opinions are grounded in reasonable interpretations of Booker's effect on restitution. On the one hand, Judge Fuentes' opinion pragmatically avoids an outcome whose consequences—mandating the Government to prove loss amount to a jury beyond a reasonable doubt whenever it seeks restitution for victims—may prove cumbersome to implement. On the other hand, the broad language of Blakely and Booker appears to dictate that any fact controlling the maximum sentence that can be imposed must be admitted or proven to the jury. Thus, as articulated in Judge McKee's dissent, under the federal restitution statutes the amount of loss-because it controls the maximum restitution that can be imposed-must be subject to the Sixth Amendment's jury requirement. Indeed, the difficulty of resolving the question before us, and the fact that Booker nowhere mentions restitution (though, to be fair, restitution was not an issue in Booker), suggest that the Supreme Court did not take restitution penalties into consideration in crafting the Booker remedy. Until the Supreme Court directs us otherwise, however, I believe that the broad language of Booker obligates us to hold that the Sixth Amendment applies to orders of restitution under the

MVRA and VWPA. Therefore, I join in its entirety Judge McKee's opinion concurring in part and dissenting in part.

United States v. Paul J. Leahy, et al.

United States v. Kennard Gregg

United States v. James C. Fallon

Nos. 03-4184, 03-4490, 03-4542, 03-4560, and 04-2912

SMITH, Circuit Judge, concurring in part and dissenting in part.

I join in its entirety Judge McKee's opinion concurring in part and dissenting in part. I write separately to note a particular concern arising out of Part IV of the majority opinion.

The majority rests its opinion upon a distinction between the facts "authorizing restitution of a specific sum, namely 'the full amount of each victim's loss'" and the facts "merely giving definite shape to the restitution penalty born out of the conviction." Maj. Op. at 17. The majority implicitly holds that under the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005), only the facts which *authorize a "specific" punishment*, and not the facts which *give "definite shape" to that punishment*, must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt

I suggest that this is a distinction that district courts will find difficult to understand and apply in other circumstances. Consequently, the majority opinion does not satisfy "the need to give intelligible content to the right of jury trial." *See Blakely*, 542 U.S. at 305. As the Supreme Court explained in *Blakely*, defining a right to a jury trial with intelligible content

is a necessary step in protecting the people's ultimate control over the judiciary, as the Framers of the Sixth Amendment intended. *See id.* at 305-06.

Indeed, the Court in *Blakely* explicitly rejected a similar two-step approach to setting criminal punishments-first allowing the jury to determine that the defendant's actions warranted criminal punishment, and then allowing the court to determine the actual details of the crime-for precisely this reason. *See id.* at 306-07 ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.") (emphasis in original). Accordingly, because our decision today renders the right to a jury trial considerably less intelligible, and consequently undermines the people's constitutionally-protected right to ultimate control over the judicial branch, I join Judge McKee and respectfully dissent from Part IV of the majority opinion.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4490/4542/4560

UNITED STATES OF AMERICA

v.

PAUL J. LEAHY

Appellant in No. 03-4490

UNITED STATES OF AMERICA

v.

TIMOTHY SMITH

Appellant in No. 03-4542

UNITED STATES OF AMERTCA

v.

DANTONE, INC.

Appellant in No. 03-4560

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cr-00260-2)
District Judge: Honorable J. Curtis Joyner

Argued June 8, 2005

Before: FUENTES, VAN ANTWERPEN, and BECKER,
Circuit Judges.

(Filed: March 24, 2006)

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OPINION OF THE COURT

FUENTES, Circuit Judge.

I. Introduction

For a period of almost three years, the Defendants, Dantone, Inc., and its two senior managers Paul Leahy and Timothy Smith, were retained by several banks to auction repossessed automobiles at the highest price and reimburse the proceeds, minus fees and expenses, to the banks. With respect to at least 311 automobiles, however, the Defendants did not auction the cars to the highest bidder and remit the proceeds to the banks as promised. Rather, they kept those cars for their own inventories, resold them at higher prices, falsely misrepresented to the banks that they had been auctioned for less, and pocketed the difference between the false and actual prices. A jury found Smith, Leahy, and Dantone guilty of engaging in, and aiding and abetting, bank fraud in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2.

This matter presents several issues on appeal. First, we address several contentions that the District Court erroneously instructed the jury as to the Government's burden under the bank fraud statute.

Second, we consider whether there was sufficient evidence to sustain the Defendants' convictions. Third and finally, we address the scope of the federal bank fraud statute, 18 U.S.C. § 1344, and clarify the intent and loss elements required to support a conviction under the statute.[1]

Because we ultimately reject the Defendants' arguments with respect to the scope of the bank fraud statute, the District Court's jury instructions, and the sufficiency of the evidence, we will affirm their judgments of conviction. We also decide that, to the extent that the Defendants contend that the imposition of their sentences pursuant to the U.S. Sentencing Guidelines (the "Guidelines" or "U.S.S.G") are in error after Booker, such issues are best determined by the District Court in the first instance. See United States v. Davis, 407 F.3d 162 (3d Cir. 2005).

Accordingly, we will vacate the Defendants' sentences and remand for further proceedings consistent with this opinion. Because the forfeiture and restitution orders are inextricably intertwined with the District Court's loss findings under the Guidelines, we will vacate and remand those orders as well.

II. Background

A. Facts

On May 15, 2001, a federal grand jury sitting in the

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[1] The fourth issue in this case, the applicability of United States v. Booker, 125 S.Ct. 738 (2005), to orders of forfeiture and restitution is addressed in a separate opinion. See United States v. Leahy, ___F.3d ___,2006 U.S. App. LEXIS 3576 (3d Cir. Feb. 15, 2006). We apply our holding in Leahy in Part V.

Eastern District of Pennsylvania returned a ten count indictment charging Defendants Smith, Leahy, and Dantone with bank fraud, in violation of 18 U.S.C. § 1344, and aiding and abetting, in violation of 18 U.S.C. § 2 (the "Indictment"). Dantone is a privately held corporation which owns and operates a public automobile auction in Conshohocken, Pennsylvania, known as Carriage Trade Auto Auction ("Carriage Trade"). Dantone's sole shareholder and president was Dominic Conicelli, Sr. During all times relevant to the Indictment, Smith was the general manager of Carriage Trade, while Leahy was the assistant manager or operations manager.

The Indictment alleged that between approximately 1993 and 1996, Dantone entered into agreements with ten financial institutions (collectively, "the banks") to auction automobiles and remit the full proceeds of the actual sales, minus auction fees and expenses.[2] Of the ten banks at issue in this case, nine consigned cars that had been repossessed following the owners' default on a loan obligation, while the tenth, Continental Bank, consigned repossessed cars as well as cars that had been returned at the expiration of lease agreements.

Per their agreements, the banks consigned the automobiles to Carriage Trade to be auctioned to the

[2] The ten banks at issue in this matter are: Meridian Bank, Continental Bank, Trust Company of New Jersey, National Bank of Boyertown, National Penn Bank, Midlantic National Bank, Bryn Mawr Trust Company, the Police and Fire Credit Union, Mellon Bank, and the DPL Federal Credit Union. The deposits of each of these banks were insured either by the Federal Deposit Insurance Corporation or the National Credit Union Administration.

highest bidder. Nine of the ten banks established a minimum or floor price for each car; if the highest auction price fell below the minimum, the car could not be sold without the bank's consent. The banks typically would set the minimum price based on the condition of the car and in consultation with the auction's employees. The tenth bank, rather than setting minimum bids, informed Carriage Trade personnel of the amounts owed by the bank's customers on the defaulted car loans. Evidence at trial indicated that it was routine for the banks to face a deficiency balance on the outstanding loan even after the car had been auctioned, from which it could be inferred that the amount of the minimum bid set by the banks was typically lower than the outstanding loan obligation on the car. For the most part, the cars were sold "as is." When Carriage Trade sold automobiles at auction on behalf of one of the banks, Carriage Trade would send checks representing the proceeds of the sale, a bill of sale, and documents showing the expenses incurred by the auction in selling the automobiles. If the car was one which had been repossessed by the bank, the money made from the sale of the car at auction could then be put toward satisfying the outstanding loan. The banks assumed or were told that the checks received from the Carriage Trade auction represented the highest bid, minus fees and expenses.

The Indictment alleges that Dantone, Smith and Leahy defrauded the banks by not actually selling certain automobiles at an auction to the highest bidder or at the prices the Defendants represented to the banks. Instead, the Defendants diverted the cars into Carriage Trade's inventory, apparently repaired and/or reconditioned them in limited instances, and

then sold them under the Carriage Trade name at a "second sale" at prices equal to or higher than the minimum established by the banks. The Defendants deceived the banks with respect to at least 311 cars, pocketing the difference between the prices they falsely represented to the banks and the real prices they obtained for the cars at the second sale. Typically, the Defendants used two methods to sell the cars for themselves. Most of the cars were sold through the Carriage Trade auction to good faith purchasers who did not know that the Defendants had misappropriated the cars for their own inventories. The Defendants also sold a smaller number of cars in a private auction to a select group of car dealers, who were invited to bid on the cars. The scheme began to unravel, however, when Edward Stigben, a co-schemer with the Defendants, was approached by the FBI regarding an on-going investigation of Carriage Trade; Stigben eventually received immunity from the Government in exchange for his testimony at trial regarding the fraudulent scheme.

A 2 1/2 week jury trial began on December 2, 2002. The Government introduced the testimony of bank representatives as well as employees of Carriage Trade. The Government also introduced a ledger maintained by Leahy (the "Leahy ledger") which detailed the profits realized by Dantone as a result of the Defendants' deceptive conduct. In addition, the Government introduced, for each of the 311 cars, the two sets of documents that Carriage Trade prepared: the false bill of sale and accompanying paperwork which the Defendants sent to the bank along with a check, and the true bill of sale and accompanying paperwork that was generated when the Defendants sold the cars for their own benefit.

On December 20, 2002, the jury returned a verdict of guilty on all counts as to each Defendant.

B. Sentencing

Thereafter, the District Court initiated sentencing proceedings against the Defendants. Because the Defendants' conduct involved a fraudulent scheme in violation of 18 U.S.C. § 1344, they were sentenced under U.S.S.G. § 2F1.1, the Guidelines provision applicable to crimes of fraud and deceit. Section 2F1.1 provides for a base offense level of six with enhancements to the offense level based on the amount of loss to the victim attributable to the fraudulent conduct. At the Defendants request, the District Court held a four hour evidentiary hearing to determine the amount of loss to the victim banks for purposes of the Guidelines. The Defendants, relying on United States v. Dickler, 64 F.3d 818 (3d Cir. 1995), argued that the loss to the banks was zero, or in the alternative, far less than the $418,657 amount relied on by the Government. In particular, the Defendants contended that they had significantly enhanced the values of the consigned automobiles by refurbishing them and by extending certain guarantees and perks such as credit terms to purchasers under the Carriage Trade name. They argued that any such "improvements" in value to the cars should not be credited as loss to the banks for purposes of the Guidelines. At the end of the hearing, the District Court essentially adopted the Government's position, finding that the loss to the banks was $408,970, which was calculated by subtracting from the total gain to the Defendants – the $418,657 amount representing the difference between the false sales price and the actual sales price for the 311 cars – the following: (1) $5,000 for a reimbursement payment that Carriage

Trade made to one of the banks (Midlantic Bank) after the bank discovered a fraudulent sale and complained to Conicelli; and (2) $4,687 in repairs and enhancements which the District Court found the Defendants made to some of the 311 cars. The loss finding of $408,970 triggered a nine-level enhancement in the offense level pursuant to U.S.S.G. § 2F1.1.

In addition, the Indictment contained a notice of forfeiture pursuant to 18 U.S.C. § 982(a)(2) in the amount of $418,657, which was alleged to be the proceeds of the scheme, i.e., the difference between the false sales prices and the actual sales prices. During trial, the parties agreed to remove the forfeiture issue from the jury and have it decided by the District Court. On February 19, 2003, the Government filed a motion seeking entry of an order of forfeiture and money judgment. The Defendants objected, contending that the gain from their fraud was less than $418,657, based on their physical repairs to the cars as well as the other sales guarantees that were extended under the Carriage Trade name. The District Court eventually entered an order of forfeiture and money judgement in the amount of $418,657, concluding that the Government had established by a preponderance of evidence that the sum constituted proceeds that the Defendants had obtained directly or indirectly as a result of the offenses for which they were convicted.

In addition to the loss and forfeiture calculations, Smith and Leahy objected to several sentencing enhancements for their alleged role in the offense. The District Court, however, found that Smith and Leahy participated in a fraud that was committed by five or more participants, within the meaning of U.S.S.G. §

3B1.1(a); that Smith was a leader or organizer of the fraud; and that Leahy was a manger or supervisor of the fraud. Accordingly, the District Court applied a four-level enhancement to Smith's base offense level, and a three-level enhancement to Leahy's base offense level.

Smith was sentenced to a prison term of 46 months; five years of supervised release; a fine of $10,000; a special assessment of $1,000; restitution, for which he bears joint and several liability, in the amount of the victim banks' loss, i.e., $408,970; and forfeiture, for which he is jointly and severally liable, in the amount of the Defendants' proceeds, i.e., $418,657. Leahy was sentenced to a prison term of 37 months; five years of supervised release; a fine of $5,000; and the same penalties as Smith regarding special assessment, restitution, and forfeiture. The corporate defendant Dantone received five years of probation; a fine of $800,000; and the same penalties as Leahy and Smith regarding restitution and forfeiture.[3]

* * *

In their appeal from their judgments of conviction

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[3] It appears that, due to a clerical error, the written judgment for the corporate Defendant Dantone contained several penalties that can only be levied against an individual. For instance, the written judgment specified that Dantone could not leave the district without permission of the probation officer, must support his or her dependents, and refrain from using drugs or excessive alcohol. The United States has indicated that it consents to the entry of an order of this Court striking these provisions. See Gov. Br. at 10 n.1. However, because we will vacate the sentences and remand for resentencing, no such order will be necessary, and the District Court may correct any such error on remand.

and sentence, the Defendants raise several arguments. First, the Defendants allege that the District Court's jury instructions were defective in several critical respects and failed properly to instruct the jury as to the requisite elements to convict under § 1344. Second, they contend that there was insufficient evidence to sustain a conviction of bank fraud as the Government failed to proffer any evidence that the banks suffered any loss or that the Defendants acted with the requisite intent to defraud the banks, as opposed to the banks' customers, the borrowers in whose name the cars were titled. With regard to their sentences, the Defendants contend that the District Court erred in calculating the amount of loss suffered by the banks, which was relied upon by the District Court to calculate the Defendants' sentences, including their criminal fines, as well as the amount of restitution and forfeiture. The Defendants also contend that the District Court's imposition of fines, restitution and forfeiture for conduct arising out of the same underlying facts violates the Eighth Amendment's Excessive Fines Clause, and that the District Court erred in imposing joint and several liability on the three Defendants for the orders of restitution and forfeiture. Finally, the Defendants, relying on the Supreme Court's decision in Booker, contend that the District Court's imposition of forfeiture and restitution violated the Sixth Amendment.[4]

We consider each argument in turn.

II. JURY INSTRUCTIONS

[4] This Court has jurisdiction over a judgment of conviction and sentence in a criminal case pursuant to 28 U.S.C. § 1291.

The Defendants were convicted of violating the federal bank fraud statute, 18 U.S.C. § 1344, which imposes criminal penalties upon:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice to
>
> (1) defraud a financial institution; or
>
> (2) obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises.

The Defendants argue that the District Court: (A) improperly instructed the jury on the two prongs of the bank fraud statute; (B) improperly defined a scheme or artifice to defraud; (C) failed to give Defendants' requested good faith instruction; (D) improperly gave a willful blindness instruction; (E) improperly gave an intangible rights instruction; and (F) improperly gave a co-schemers' liability instruction.

We exercise plenary review in determining "whether the jury instructions stated the proper legal standard." United States v. Coyle, 63 F.3d 1239, 1245 (3d Cir. 1995). We review the refusal to give a particular instruction or the wording of instructions for abuse of discretion. Finally, "when we consider jury instructions we consider the totality of the instructions and not a particular sentence or paragraph in isolation." Id.

A. Bank fraud

The District Court provided a lengthy instruction to the jury regarding the elements of bank fraud. The

Defendants contend that the bank fraud instruction was in error in at least two material respects under United States v. Thomas, 315 F.3d 190 (3d Cir. 2002), a case decided only days after the jury reached its verdict in this matter.[5] First, they contend that the instruction is premised upon a disjunctive reading of § 1344 in violation of Thomas. Second, the Defendants contend that the instruction with regard to § 1344's intent requirement was in error. We find both arguments to be without merit.

In Thomas, we addressed whether the "intent to defraud the bank" element of § 1344(1) was to be read as applying to § 1344(2) as well, or whether the two prongs of the bank fraud statute should be read independently of each other. We concluded that a "disjunctive reading of the two sections of § 1344 . . . gives the statute a breadth of scope that extends well beyond what Congress intended the statute to regulate." 315 F.3d at 196. Relying on prior decision in United States v. Monostra, 125 F.3d 183 (3d Cir. 1997) (suggesting, but not holding, that the two sections of § 1344 must be read conjunctively), as well as the legislative history of the bank fraud statute, we concluded that the § 1344 must be read in the conjunctive, that the intent to defraud the bank element of § 1344(1) must apply to § 1344(2) as well. Thomas, 315 F.3d at 196. Accordingly, "there can be no such thing as an independent violation of subsection

[5] Although Thomas was decided after the jury reached its verdict, it is well-established that we will apply the law of the Court as it exists at the time of appeal. See Virgin Islands v. Civil, 591 F.2d 255, 258 (3d Cir. 1979) ("As a general principle, an appellate court applies the law as it exists at the time of appeal even if different than at the time of trial.").

(2). To convict at all under the bank fraud statute, there must be an intent to defraud the bank." Id., 315 F.3d at 197. "The sine qua non of a bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank." Id.[6]

After reviewing the District Court's bank fraud instruction in this matter, we find that the instructions did not rest on an erroneous disjunctive reading of § 1344. The instructions explained the two prongs of the bank fraud statute as follows:

> The bank fraud law provides that whoever knowingly executes or attempts to execute a scheme or artifice, one, *to defraud a federally chartered or insured financial institution, or two, to obtain any of the moneys, funds, credits, assets, security or other property owned by or under the control or custody of a financial institution by means of false or fraudulent*

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6 There is some disagreement among the circuits as to the proper reading of § 1344. For instance, the Second Circuit formally reads § 1344 in the disjunctive. See United States v. Crisci, 273 F.3d 235, 239 (2d Cir. 2001). However, as we noted in Thomas, to the extent that the Second Circuit implies the intent to defraud requirement of subsection (1) to cases brought under subsection (2), there is no meaningful difference in our interpretation of the statute. See Thomas, 315 F.3d at 198 n.1 (citing United States v. Rodriguez, 140 F.3d 163, 167 n.2 (2d Cir. 1998) (noting that deceptive pattern of conduct designed to deceive bank was required to prove case under either subsection (1) or (2))). Accord United States v. Sprick, 233 F.3d 845, 852 (5th Cir. 2000); United States v. Davis, 989 F.2d 244, 246-47 (7th Cir. 1993). However, it appears that the Sixth Circuit has taken a contrary view, holding that under subsection (2) of § 1344, there is no requirement that the defendant intended to defraud the bank. See United States v. Everett, 270 F.3d 986, 991 (6th Cir. 2001).

pretenses, representations or promises, shall be guilty of the crime of bank fraud.

. . .

Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there *was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution* by means of false or fraudulent pretenses, representations or promises.

The phrases, scheme or artifice to defraud, and scheme or artifice to obtain money, means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another, or by which someone intends to deprive another of something of value. A scheme or artifice includes a scheme to deprive another person of tangible, as well as intangible property rights.

App. at 2131a-2332a (emphasis added). Although the District Court did no more than quote the plain language of both prongs of § 1344, the Defendants take issue with the highlighted language, which they contend permitted the jury to convict on a disjunctive reading of the statute in violation of Thomas. However, the Defendants read the quoted paragraphs in isolation, ignoring the District Court's subsequent instructions with regard to the specific intent requirement of § 1344. See Coyle, 63 F.3d at 1245 (noting that the Court will "consider the totality of the instructions and not a particular sentence or paragraph in isolation").

In particular, the District Court instructed the jury that:

> The second element of bank fraud, which the government must prove beyond a reasonable doubt, is that the defendants participated in the scheme to defraud with the intent to defraud. To act with an intent to defraud means to act knowingly and with the purpose to deceive or to cheat. An intent to defraud is ordinarily accompanied by a desire or a purpose to bring about gain or benefit to onself or some other person, or by a desire or a purpose to cause some loss to some person. *The intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property.*

App. at 2135a (emphasis added). This is in accord with the holding of Thomas, that "the sine qua non of a bank fraud violation, no matter what subdivision of

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[7] Our dissenting colleague contends that the "intent to deceive the bank" instruction was too "isolated" from the disjunctive reading of the statute, and was not otherwise given when the jury asked the District Court to repeat the elements of bank fraud. Dis. Op. at 4. With regard to the former contention, we note that the District Court instructed the jury that the "intent to defraud" element of § 1344 was defined as "intent to deceive the bank in order to obtain from it money or other property." If anything, by clearly defining the mens rea element of § 1344 as part of the charge on intent, the District Court amplified the requirements of Thomas, rather than isolate it in the instructions, as the dissent contends. As for the dissent's latter contention, we agree that the District Court only stated that "an intent to defraud" was required. However, in this supplemental charge, the District Court clearly indicated that it was only "reinstruct[ing] on the elements of bank fraud." App. at 2160a.

(footnote continues)

the statute it is pled under, is the intent to defraud the bank." Thomas, 315 F.3d at 197.[7] In Thomas, we recognized that "[b]ank fraud may involve a scheme to take a bank's own funds, it may involve a scheme to take funds merely in a bank's custody" so long as the government established the requisite intent to defraud. 315 F.3d at 197 (emphasis added). Here, the District Court did precisely that by properly instructing the jury that guilt under § 1344 depended on a finding that the Defendants had the requisite intent to defraud the banks.[8]

The Defendants' second argument is that the District Court erroneously instructed the jury as to the

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(footnote continued)
It was not, however, reinstructing on the definition of these elements. Id. ("If you want the additional definitions of each of these terms that are used, then you can go back out and put that on paper and ask for me to do it."). In these circumstances, we do not believe that the jury was misinformed regarding the mens rea element of § 1344, when the District Court previously clearly defined the "intent to defraud" element as the "intent to deceive the bank in order to obtain from it money or other property."

[8] The dissent focuses on the fact that the District Court defined the mens rea element of § 1344 as an "intent to deceive the bank in order to obtain from it money or other property," as opposed to "an intent to defraud the bank" in the language of Thomas. Dis. Op. at 6. However, it is well-established that the "intent to defraud the bank" element of § 1344 may be defined as "an intent to deceive the bank in order to obtain from it money or other property." See United States v. Moran, 312 F.3d 480, 480 (1st Cir. 2002) (quoting United States v. Kenrick, 221 F.3d 19, 30 (1st Cir. 2000) (en banc)); see also United States v. Brandon, 298 F.3d 307, 311 (4th Cir. 2002); United States v. Lamarre, 248 F.3d 642, 649 (7th Cir. 2001); United States v. Hanson, 161 F.3d 896, 900 (5th Cir. 1998).

intent or mens rea requirement of § 1344. In particular, the District Court, while instructing the jury that an "intent to deceive the bank in order to obtain from it money or other property" must be shown, also stated that an "[i]ntent to harm the bank is not required." App. at 2135a. Defendants contend that this was in error because conviction under § 1344 requires not only proof of an intent to defraud the bank, but also of an intent to harm the bank. In making this argument, Defendants once again rely on our decision in Thomas. However, we do not believe that this case is controlled by Thomas; rather, we believe it is controlled by our later decision in United States v. Khorozian, 333 F.3d 498 (3d Cir. 2003), which makes clear that Thomas applies to a certain factual context not present here. We explore both decisions in detail below.[9]

In Thomas, the defendant was employed as a home health care aide to an elderly account holder, who authorized Thomas to complete pre-signed checks, by filling in the amount and name of the payee, to pay for

[9] The distinction between an intent to defraud a bank versus the intent to harm or injure a bank is so subtle that it may well seem trivial. In most contexts, one could understand an intent to defraud a bank as the equivalent of an intent to harm the bank. For instance, the mere act of defrauding a bank by passing false information can be said to harm or injure a bank, as it denies the bank an opportunity to make an informed business decision. Nonetheless, in light of the Defendants' argument and the District Court's juxtaposition of the intent to defraud instruction with the intent to harm instruction, the subtle difference becomes apparent. Were there a specific intent to harm element, a jury might not convict a defendant whose intent was to enrich himself or steal from a third party, yet who lacked any desire to harm or injure the bank.

household necessities and other bills. Over a nine-month period, Thomas made out several checks to cash or in her own name allegedly for such purposes as the purchase of groceries; however, in reality, the defendant pocketed the funds for her own benefit. Evidence at trial indicated that the only victim of the defendant's fraud who suffered a loss was the account holder, not the bank. On appeal, after holding that an intent to defraud the bank was a necessary element of bank fraud regardless of what subsection of § 1344 was pled, we endeavored to "decide the thorny question of what is meant by the subsection (1) requirement that the defendant intends to defraud the bank." Thomas, 315 F.3d at 199. We concluded that, in light of the legislative history that "Congress sought to proscribe conduct that victimized banks . . . [,] harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud." Id. at 200 (quotation and citations omitted). Thus, under Thomas, conviction under § 1344 requires some proof that the perpetrator of the fraud intended to cause loss or liability - harm - to the bank. Id. at 199 (holding that "conduct, reprehensible as it may be, does not fall within the ambit of the bank fraud statute when the intention of the wrongdoer is not to defraud or expose to the bank to any loss but solely to defraud the bank's customer"). Because the record indicated that there was no loss to the banks, let alone any intent to cause such a loss, we reversed the defendant's conviction for bank fraud. See id. at 202 ("Thomas's actions, in fact, demonstrate that she never intended to victimize the banks. Her only victim was [the elderly account holder].").[10]

Subsequent to our decision in Thomas, we decided Khorozian. In Khorozian, the defendant was charged

with bank fraud on account of her attempt to deposit $20 million in counterfeit checks on behalf of an individual that she did not know. As part of the fraudulent scheme, the defendant made misrepresentations to the bank as to the purpose of the deposits as well as the identity of the person who accompanied her during visits to the bank. On appeal, we considered whether there was any evidence of loss or liability to the bank, concluding that such a loss existed by virtue of the fact that the bank, had it negotiated the counterfeit checks, would have been exposed to a $20 million loss under the UCC. Khorozian, 333 F.3d at 505 n.5. The defendant argued that, because she did not know that the checks were counterfeit, she had no intent to harm the bank. In response, we cited with approval the First Circuit's decision in United States v. Moran, 312 F.3d 480 (1st Cir. 2002), for the proposition: "Importantly, Moran held the defendants guilty even though they did not specifically intend to cause the bank a loss (i.e., they intended that the loans would be repaid), but rather intended only to make *misrepresentations* that made a loss more likely." Khorozian, 333 F.3d at 505

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[10] Thomas does not specify whether the intent to cause loss element is a general intent or specific intent requirement. However, given Thomas's use of the conduct/contemplate language, we believe that Thomas understood it to be a general intent requirement, and that § 1344's only specific intent requirement is the specific intent to defraud. 315 F.3d at 200 ("[H]arm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud.") (citations omitted). The "general intent standard typically only requires that a defendant 'possessed knowledge with respect to the actus reus of the crime.'" Auguste v. Ridge, 395 F.3d 123, 145 & n.23 (3d Cir. 2005) (quoting Carter v. United States, 530 U.S. 255,268 (2000)).

(emphasis in original). Accordingly, "§ 1344's specific intent requirement is satisfied if an individual commits an act that could put the bank at risk of loss." Id. Thus, Khorozian clarified Thomas's holding regarding the mens rea element of § 1344, making clear that intent to cause a loss or liability, or an intent to harm the bank, is not required. Rather, loss, or risk of loss, goes to the consequences of the fraudulent scheme, and it need not be intended to satisfy § 1344's mens rea requirement of a specific intent to defraud a bank.

Khorozian went on to distinguish Thomas on its facts, noting that Thomas and other similar cases "involved fraud on a third party where the bank was merely an 'unwitting instrumentality' in the fraud rather than the 'target of deception.'" Khorozian, 333 F.3d at 505 (quoting Thomas, 315 F.3d at 201)). Accordingly, Khorozian limited Thomas's requirement of an intent to cause loss or liability to the bank to those situations where the bank was merely an "unwitting instrumentality" of the fraud; however, where the bank is a direct target of the deceptive conduct or scheme, § 1344 is satisfied by proof of a specific intent to defraud the bank plus fraudulent conduct (e.g., misrepresentations) which creates an actual loss or a risk of loss. In other words, where the fraudulent scheme targets the bank, there is no requirement that the defendant intended to harm the bank or otherwise intended to cause loss.

We think the Khorozian rule is eminently sensible where the bank is the "target of deception." Id. at 505. The purpose of the bank fraud statute is to protect the "financial integrity of [banking] institutions." See S. Rep. No. 98-225, at 377, reprinted in 1984 U.S.C.C.A.N. 3517. As we noted in Thomas, "Congress

enacted the bank fraud statute to fill gaps existing in federal jurisdiction over 'frauds in which the victims are financial institutions that are federally created, controlled or insured.'" 315 F.3d at 197 (quoting S. Rep. No. 98-225 at 377, reprinted in 1984 U.S.C.C.A.N. 3517). In our view, where the bank is the "target of the deception," it makes no difference whether the perpetrator had an intent to harm the bank. Indeed, any conduct that causes loss or harm to a bank is likely to undermine the public's confidence in the integrity of a bank, or otherwise adversely affect the bank's public image, regardless of whether the loss or harm was so intended. In these circumstances, imposing an intent to ham requirement where the bank is the "target of deception" would leave an unnecessary gap in the reach of the bank fraud statute, which we think would contradict Congress' purpose as well as undermine the broad federal interest in protecting financial institutions. Rather, proof of a specific intent to defraud the bank is sufficient under Khorozian.

However, where the bank is not the "target of deception," but rather merely an "unwitting instrumentality," there is the additional concern that § 1344 may be applied in a manner that reaches conduct that falls well beyond the scope of what the statute was intended to regulate. As we noted in Thomas, "[t]he deception of a bank as an incidental part of a scheme primarily intended to bilk a bank customer does not undermine the integrity of banking." 315 F.3d at 200. Thus, to ensure that § 1344 was not applied to conduct falling outside the scope of the bank fraud statute, we imposed the additional requirement of proof of an "inten[t] to cause a bank a loss or potential liability." Id. at 201 (citing United States v. Laljie, 184

F.3d 180, 191 (2d Cir. 1999)). Accordingly, where the perpetrator had an intent to victimize the bank by exposing it to loss or liability, such conduct falls comfortably within the reach of § 1344; however, where there is no evidence that the perpetrator had an intent to victimize the bank, Thomas makes clear that merely an intent to victimize some third party does not render the conduct actionable under § 1344.[11]

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[11] There appears to be a disagreement in the circuits as to whether an "intent to harm" is required under § 1344. For instance, the First Circuit, sitting en banc in Kenrick, examined the common law history of fraud and concluded that the "intent element of bank fraud under either subsection [of § 1344] is an intent to deceive the bank in order to obtain from it money or other property. 'Intent to harm' is not required." 221 F.3d at 29; see also id. (noting that "[a]lthough it may ordinarily accompany a scheme to defraud a bank, an ultimate 'purpose of either causing some financial loss to another or bringing about some financial gain to oneself is not the essence of fraudulent intent. What counts is whether the defendant intended to deceive the bank in order to obtain from it money or other property, regardless of the ultimate purpose.") (internal citation omitted). In contrast, the Second Circuit has stated that "an intent to harm" is an essential element of bank fraud, although it appears that the Second Circuit interprets an "intent to harm" in a manner that focuses principally on whether the fraudulent conduct causes loss or a risk of loss. See United States v. Chandler, 98 F.3d 711, 715-16 (2d Cir. 1996) (no plain error where district court failed to give "intent to harm" instruction; finding that the intent to deceive is the functional equivalent of the essential finding of intent to harm, and upholding conviction on grounds that the bank "was necessarily exposed to a potential loss"); see also United States v. Chacko, 169 F.3d 140, 148-49 (2d Cir. 1999) (holding that an intent to harm can be inferred from conduct that "has the effect of injuring as a necessary result of carrying it out"); Crisci, 273 F.3d at 240 (upholding bank fraud conviction where the defendant cashed

(footnote continues)

We believe this case is clearly controlled by Khorozian. The Defendants' fraudulent conduct clearly targeted the banks, not any third party such as the banks' customers, the debtors from whom the cars had been repossessed. The Defendants misrepresented to the banks that they would auction the cars at the highest price; they diverted the cars to Carriage Trade's inventory despite their promises to the contrary; they prepared false bills of sale that were sent to the banks; and they occasionally overstated the extent of the physical damage of the cars to the banks in an effort to justify the low prices. Thus, the banks in this case were more than incidental victims or mere unwitting instrumentalities as was the case in Thomas. Rather, like the bank in Khorozian, the banks here were the direct targets of the misrepresentations and the fraudulent scheme. Moreover, the Defendants had little, if any, contact with the banks' customers.

The dissent disputes our reading of Khorozian, asserting that it can be read "as being entirely faithful to Thomas." Dis. Op. at 7-8. However, in our view, the dissent's reading of Khorozian is unpersuasive, as it ignores its language and holding. While Khorozian correctly notes that the specific intent element of § 1344 is the specific intent to defraud the bank, 333 F.3d at 503, nowhere does the opinion expand the mens rea requirement, as the dissent suggests, to also

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(footnote continued)
fraudulent checks with forged endorsements, even though checks never presented to bank, on the grounds that jury could find that he "intended to harm a bank"; dispositive of the intent to victimize was the fact that the defendant's conduct put the bank at a risk of loss, not any intent to cause that loss.).

require an intent to cause risk of loss. This reading of Khorozian is borne out by an examination of the First Circuit's decision in Moran, upon which Khorozian heavily relied, which followed the First Circuit's prior en banc unanimous decision in Kenrick, which unambiguously concluded that there is no intent to harm, or intent to cause loss, requirement under § 1344. Moran, 312 F.3d at 488-89 (citing Kenrick, 221 F.3d at 30).[12]

Applying the foregoing principles to the jury instructions in this case, we believe that the District Court did not err in instructing the jury that "[i]ntent to harm the bank is not required." The jury instructions, taken as a whole, instructed the jury that an intent to defraud the bank had to be found before the Defendants could be convicted of bank fraud. See App. at 2135a ("The intent element of bank fraud is an intent to deceive the bank in order to obtain from it

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[12] The dissent also contends that by failing to instruct the jury that an intent "to victimize the bank" was required under § 1344, the District Court's instructions permitted the jury to convict under an erroneous disjunctive reading of the bank fraud statute, and more specifically, subsection (2), in violation of Thomas. Dis. Op. at 5-6. We disagree. Thomas held, and Khorozian reaffirmed, that the "sine qua non of a bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank." Thomas, 315 F.3d at 197; Khorozian; 333 F.3d at 503. Here, the District Court clearly instructed the jury that the mens rea element of § 1344 was the "intent to deceive the bank in order to obtain from it money or other property." Given that the jury could not convict the Defendants without a finding of such an intent, there was simply no risk that the Defendants were convicted under a disjunctive reading of the bank fraud statute. Accordingly, the jury instructions were consistent with Thomas and Khorozian's holding that § 1344 must be read in the conjunctive.

money or other property."). Khorozian requires no more with respect to the instruction of the jury as to § 1344's intent element.

The Defendants allege one final error in the District Court's bank fr: ud instructions. In response to a written question from the jury, the District Court provided a supplemental oral instruction regarding the elements of bank fraud: "To prove a charge of bank fraud, the defendant must establish each of the following elements beyond a reasonable doubt." See App. at 2160a (emphasis added). Clearly, this was in error, as the burden of proof was on the Government. Notably, the Defendants did not raise any objection to this before the District Court, nor did they raise this error in their opening briefs to this Court. Nevertheless, it is obvious that the District Court's mistaken use of the word "defendant" did not constitute plain error as it could not have prejudiced the Defendants. See United States v. Williams, 299 F.3d 250, 257 (3d Cir. 2002) (no plain error where error does not cause prejudice). When read in the context of the entire instructions to the jury, there is no doubt that the jury understood that the burden of proof was on the Government at all time to prove every element of the crime charged.

B. The meaning of "fraud"

The District Court instructed the jury, over Defendants' objection, that the fraud element of a bank fraud conviction is defined as follows:

> Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money

> owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representation or promises.
>
> . . .
>
> The term false or fraudulent pretenses, representations or promises, means a statement or an assertion which concerns a material or important fact, or material or important aspect of the matter in question that was either known to be untrue at the time that it was made or used, or that it was made or used with reckless indifference as to whether it was, in fact, true or false and made or used with the intent to defraud.
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> . . .
>
> The fraudulent nature of a scheme is not defined according to any technical standards. *Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light of the community.*
>
> Fraud embraces all of the means which human ingenuity can devise to gain advantage over another by false representation, suggestions or suppression of truth or deliberate disregard or omission of truth.

App. at 2132a-2134a (emphasis added). Focusing on the emphasized sentence above, the Defendants contend that the jury instruction defining fraud as a deviation from moral uprightness or fairness was erroneous. In particular, the Defendants contend that

the instruction was too vague, permitting conduct to be criminalized without sufficient specificity, and failing to ensure that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Second, the Defendants, citing United States v. Lanier, contend that the instruction in question was overbroad to the extent that it reached conduct that is not covered by § 1344, thereby putting the court in the position of developing common law crimes. See 520 U.S. 259, 267 n.6 (1997) (noting that courts are not in the business of creating common law crimes, and that "[f]ederal crimes are defined by Congress"). Finally, the Defendants contend that the instruction invited the jury to impose purportedly objective criteria of morality and fairness to convict them when, in fact, § 1344 requires proof that a defendant had the specific intent to defraud.

We have, in the past, defined fraud with reference to the elastic concepts of morality and fairness when discussing the reach of the federal fraud statutes. See United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987) ("The term 'scheme to defraud,' however, is not capable of precise definition. Fraud instead is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community."); see also United States v. Trapillo, 130 F.3d 547, 550 n.3 (2d Cir. 1997); United States v. Schwartz, 899 F.2d 243, 246-47 (3d Cir. 1990); United States v. Keplinger, 776 F.2d 678, 698 (7th Cir. 1985); United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980); United States v. Van Dyke, 605 F.2d 220, 225

(6th Cir. 1979); United States v. Gregory, 253 F.2d 104, 109 (5th Cir. 1958). However, as a tool for construing the scope of the federal fraud statutes, the formulation of fraud as a departure from moral uprightness and fairness has come under increasing criticism. In particular, the ambiguity inherent in concepts such as morality and fairness has been thought to provide constitutionally inadequate notice of what conduct is criminal, involve judges in the creation of common law crimes, and place excessive discretion in federal prosecutors. See United States v. Panarella, 277 F.3d 678, 698 (3d Cir. 2002) (noting that such formulations of fraud "do little to allay fears that the federal fraud statutes give inadequate notice of criminality and delegate to the judiciary impermissible broad authority to delineate the contours of criminal liability"); Matter of EDC, Inc., 930 F.2d 1275, 1281 (7th Cir. 1991) (noting that "[s]uch hyperbole . . . must be taken with a grain of salt. Read literally it would put federal judges in the business of creating new crimes; federal criminal law would be the nation's moral vanguard."); United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987) (noting that the aforementioned definition of fraud "cannot have been intended, and must not be taken literally. It is much too broad and, given the ease of satisfying the mailing requirement [of mail fraud] would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute."), judgment vacated on other grounds, 484 U.S. 807 (1987); United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996).

Defendants correctly note that courts, including this one, have typically used the morality and fairness formulation of fraud only as a statement of statutory

intent or as a means of defining the scope of the federal fraud statutes; we have not, however, examined the proprietary of using such language in jury instructions. We admit that the concerns we expressed in Panarella, as well as by other courts, are magnified in the context of jury instructions, as it is probable that the jury will be swayed by elastic formulations of morality and fairness in the absence of sufficient context and guidance from the court. Indeed, had the highlighted language challenged by the Defendants been given to the jury in isolation, we would be presented with a very different matter, as it is plain that not every departure from moral uprightness and fairness can or will constitute a scheme to defraud within the meaning of the bank fraud statute.

However, we cannot look at the challenged instruction in isolation, as the Defendants do. We believe that the instructions, taken as a whole, properly instructed the jury as to the proof required to establish a "scheme to defraud" as well as the appropriate intent to defraud, which we have discussed previously. The jury could not have convicted the Defendants merely for failing to adhere to standards of moral uprightness or fundamental honesty. Indeed, we note that this Court recently affirmed the use of a very similar jury instruction in Khorozian, with the only difference being the Khorozian instruction did not contain the language "moral uprightness."[13] 3[illegible] F.3d at 508-09 (scheme or

[13] The dissent takes issue with our reliance on Khorozian, noting that the problematic language "moral uprightness" was missing from the Khorozian charge, and that Khorozian at least involved

(footnote continues)

artifice may be found "where there has been a departure from basic honesty, fair play and candid dealings"); see also United States v. Frost, 125 F.3d 346, 371-72 (6th Cir. 1997) (upholding use of similar formulation of fraud in context of detailed jury instruction which, as a whole, provided that the jury could not convict defendants merely for not having acted according to fundamental honesty or moral uprightness"); United States v. Dobson, – F.3d –, 2005 WL 1949935, at *6 (3d Cir. Aug. 16, 2005) (affirming use of instruction defining scheme to defraud as involving "a departure from fundamental honesty, moral uprightedness, or fair play and candid dealings in the general light of the community"). We continue to have concerns regarding the definition of fraud with reference to such abstract terms as morality and fairness. However, we do not believe that this matter presented any real risk that the District Court's instruction invoking concepts of morality and fairness, when read with the rest of the instructions, allowed for conviction solely based on this formulation of fraud. Accordingly, we find no error.

C. Good faith

The Defendants requested an instruction that if the jury found the Defendants to have acted in subjective good faith, they must be found not guilty;

(footnote continued)
a clear instruction on the specific intent element of 18 U.S.C. § 1344. See Dis. Op. at 14-15. As for the latter comment, we have already noted that the jury in this matter was properly instructed as to the mens rea element of 18 U.S.C. § 1344. As for the former, we do not see how the mere inclusion of the phrase "moral uprightness," given the context of the entire jury charge, rendered the instructions erroneous under Khorozian.

the Defendants also requested an instruction that the Government bore the burden of proving an absence of good faith beyond a reasonable doubt. The District Court refused to give the good faith instruction, reasoning that the court's instruction as to intent adequately covered the matter and rendered a good faith instruction unnecessary. We reverse "a district court's denial to charge a specific jury instruction only when the requested instruction was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." United States v. Phillips, 959 F.2d 1187, 1191 (3d Cir. 1992).

In United States v. Gross, 961 F.2d 1097 (3d Cir. 1992), we held, adopting what has become the majority position among the circuits, that a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a "knowledge" crime. Id. at 1102-03. In this matter, the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant. If the jury found that the Defendants had acted in good faith, it necessarily could not have found that the Defendants had acted with the requisite scienter. Accordingly, any good faith instruction would have been unnecessary and duplicative.[14]

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[14] The Eighth and Tenth Circuits have held that a district court abuses its discretion by refusing to give a good faith defense charge even if the court has already given an instruction on the

(footnote continues)

D. Willful blindness

Over the Defendants' objection, the District Court issued a willful blindness instruction to the jury:

> I further instruct you, members of the jury, that the element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him.
>
> While a showing of negligence or a mistake is not sufficient to support a finding of willfulness or knowledge, a finding beyond a reasonable doubt of a conscious purpose to avoid learning the truth would permit an inference of knowledge. Stated another way, members of the jury, a defendant's knowledge of a fact may be inferred from a deliberate or intentional ignorance of, or a willful blindness to, the existence of a fact. Deliberate ignorance is not a safe harbor for a defendant's culpable conduct. It is entirely up to you, members of the jury, as to whether you find any deliberate closing of the

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(footnote continued)
elements of the crime. See United States v. Casperson, 773 F.2d 216, 223-24 (8th Cir. 1985); United States v. Hopkins, 744 F.2d 716, 71 8 (10th Cir. 1984) (en banc). Although the Defendants request that this Court reconsider Gross, and adopt the position of the Eighth and Tenth Circuits, we see no sound reasons to do so as we continue to believe that Gross was correctly decided. In any event, we note that the Eighth Circuit appears to have moved towards the majority position. See Willis v. United States, 87 F.3d 1004, 1008 (8th Cir. 1996) (finding good faith instruction not required, despite defendant's request, where jury instructions adequately conveyed specific intent requirement).

> eyes, and as to the inferences to be drawn from such evidence.

App. at 2135a-2136a. The Defendants do not challenge the legal adequacy of the instruction as it was worded, but rather the propriety of giving the instruction in this case. In particular, they contend that there was no support in the record that any defendant, or any person who could bind the corporate defendant Dantone, had deliberately avoided learning about the fraudulent scheme.

A willful blindness instruction is often described as sounding in "deliberate ignorance." United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000). "We have upheld a district court's willful blindness instruction where the charge made clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." Khorozian, 333 F.3d at 508 (quoting United States v. Stewart, 185 F.3d 112, 126 (3d Cir. 1999)). A willful blindness instruction is also proper when "[t]he jury could have found that [the] defendant deliberately closed his eyes to what otherwise would have been obvious to him." Id. We have noted that it is not inconsistent to give a charge as to both willful blindness and actual knowledge so long as the willful blindness charge is supported by sufficient evidence. See Wert-Ruiz, 228 F.3d at 255 (citation omitted). Accordingly, the mere fact that the evidence supports a finding of actual knowledge of a fact in question on the part of the Defendants does not bar the District Court from also giving a willful blindness charge to the jury so long as the record supports the provision of such an instruction.

On the record before us, we believe that there was sufficient evidence to support the District Court's willful blindness charge to the jury. In particular, evidence presented at trial permitted a finding by the jury that Dominic Conicelli, Sr., the sole shareholder and president of Dantone, may have been deliberately ignorant to the deceptive practices that Dantone was engaged in, or that the cars were not being auctioned as promised. For instance, in March 1995, one of the ten banks – Midlantic Bank – discovered that Carriage Trade had apparently sold one of their automobiles to Carol Leahy, the Defendant's sister, for approximately $3,500 more than had been remitted to Midlantic as auction proceeds. When confronted by Midlantic, Smith fabricated the story that the car in question had extensive electrical damage in the amount of $3,000 and had to be towed through auction, thus bringing in a low price. Later, during a meeting between Midlantic and Conicelli, Conicelli admitted that Smith had lied regarding the electrical damage, becoming upset and offering to fire Leahy, yet he continued to insist that the car in question had been auctioned, rather than misappropriated by Carriage Trade and sold to Carol Leahy. While Conicelli's statement could evidence actual knowledge, it could also be read as suggesting a high probability that Conicelli was deliberately ignorant of his employees' fraudulent scheme, despite having learned facts indicating that the Midlantic's repossessed car had not been auctioned as represented to the bank.

The Government also points to testimony of an FBI special agent at trial regarding his interview of Conicelli during a search of the offices of Carriage Trade on March 5, 1996. The FBI agent testified that, during the interview, he confronted Conicelli with two

sets of documents – the true bill of sale and the false bill of sale for the Carol Leahy car. When shown the documents, Conicelli stated that he remembered the car and that he had personally asked the dealer not to take possession of the car because she had wanted to purchase it. The FBI agent then proceeded to question Conicelli about other instances where an automobile consigned to Carriage Trade for auction was in fact never auctioned, but Conicelli denied having any knowledge of such transactions. The FBI agent then informed Conicelli that there may have been at least 150 instances where automobiles had not been auctioned as represented to the banks but instead sold as part of Carriage Trade's inventory. Conicelli responded by expressing doubts about this and asked to see evidence of such irregularities. When shown two such examples – bills of sale for the same car, one false and one true, indicating that Carriage Trade had sold the cars in a second sale to a buyer for a higher price than what was reported to the bank – Conicelli reacted with denial and disbelief, as the FBI agent testified at trial: "He said something to the effect, I don't know what the heck – I don't remember these cars." App. at 1566a-67a. Based on Conicelli's reaction to the allegations made by the FBI agent, a jury could infer that, despite his position with Carriage Trade, he was willfully blind to the scheme his company and his employees were engaged in, despite substantial documentary evidence of such a fraudulent scheme.

Evidence relating to Leahy also supported a willful blindness charge. At trial, it was shown that Leahy maintained a detailed ledger which kept track of the profits of the fraudulent scheme. Moreover, Kelly Gruver, an immunized former employee of Carriage Trade who was responsible for preparing and mailing

checks to the banks, testified that between 1993 and 1996, Leahy would bring her bills of sale already filled out with the names of the banks as sellers, third parties as buyers, and prices. Leahy told her to enter the cars into Carriage Trade's inventory and then send checks to the banks, as if the cars had been auctioned. Despite this conduct, counsel for Leahy argued at trial that the Defendant did not know that the cars were being falsely auctioned, or that any of his conduct, from maintaining the ledger or his instructions to Gruver to issue checks to the banks while registering the cars in Carriage Trade's inventory, was fraudulent or deceptive. E.g., App. at 3180a, 3192a-3196a; see also Reply Br. of Leahy at 3, 8. In our view, there is sufficient support in the record to justify a willful blindness charge, as a jury could find that Leahy was aware of certain facts which indicated that there was a high probability that Carriage Trade was engaged in a scheme to defraud the banks, and yet deliberately avoided learning about the fraudulent nature of the scheme.[15]

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[15] Neither the Defendants, nor the Government, discuss the evidence to support a willful blindness charge against Smith. Assuming arguendo that the District Court's provision of a willful blindness instruction as to Smith was in error, we believe that, given that the instruction itself contained the proper legal standard, which the Defendants do not contest, and given the ample evidence of actual knowledge on the part of all Defendants, as discussed in Part IV infra, any error in the instructions would have been harmless. See United States v. Mari, 47 F.3d 782, 785-86 (6th Cir. 1995) (holding that provision of a willful blindness charge that is not supported by the record but that contains the proper legal standard is harmless as a matter of law because the jury "will consider the theory, and then dismiss it for what it is - mere surplusage, a theory of

(footnote continues)

E. Intangible Rights

The District Court instructed the jury that "[a] scheme or artifice includes a scheme to deprive another person of tangible, as well as intangible property rights. Intangible property rights means anything valued or considered to be a source of wealth, including, for example, the right to honest services." App. at 2132a-2133a. Defendants contend that this instruction was in error because there was no allegation anywhere in the Indictment nor any proof at trial to support such an instruction. The Government concedes that the intangible rights charge to the jury was in error, admitting that it "never suggested to the jury an intangible rights theory; the case was exclusively presented as a financial fraud." See Gov't Br. at 77.

Defendants argue that they properly objected to the provision of the intangible rights instruction. However, we disagree that any such objection was preserved as it is clear from the record that defense counsel objected to other portions of the bank fraud charge, such as the proper reading of § 1344, but not as to the intangible rights charge. See United States v.

(footnote continued)
scienter that is insufficient to support the conviction") (citing Griffin v. United States, 502 U.S. 46 (1991)); United States v. Sasser, 974 F.2d 1544, 1553 (10th Cir. 1992) (holding "that when sufficient evidence of a defendant's guilt exists, the tendering of a 'willful blindness' instruction is harmless beyond a reasonable doubt even when the government does not introduce evidence to support such a theory"); Mattingly v. United States, 924 F.2d 785, 792 (8th Cir. 1991) (holding that erroneous provision of willful blindness charge was harmless where there was sufficient evidence to support actual knowledge); cf. United States v. S[illegible], 276 F.3d 131, 136 (3d Cir. 2002) (citing Griffin).

Jake, 281 F.3d 123, 130 (3d Cir. 2002) ("[A]n objection must...be sufficiently precise to allow the trial court to address the concerns raised in the objection. Thus, counsel must state distinctly the matter to which that party objects and the grounds of the objection.") (internal citation and quotation omitted); see also United States v. Davis, 183 F.3d 231, 252 (3d Cir. 1999). Accordingly, we will apply plain error review.

To establish plain error, the Defendants bear the burden of showing that (1) an error was committed; (2) the error was plain, that is, clear and obvious; and (3) the error affected their substantial rights. See United States v. Dixon, 308 F.3d 229, 234 (3d Cir. 2002); United States v. Vasquez, 271 F.3d 93, 99 (3d Cir. 2001) (en banc). Once these elements are established, an appellate court may exercise its discretion and reverse the forfeited error if "the error [] seriously affects the fairness, integrity, or public reputation of judicial proceedings." Dixon, 308 F.3d at 234 (internal quotation omitted). We have previously cautioned that "it is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." United States v. Gordon, 290 F.3d 539,545 (3d Cir. 2002) (internal quotation omitted).

It is clear that the intangible rights instruction was given in error as the Government did not present any evidence supporting such an instruction, nor did it allege an "intangible rights" theory. However, it is also clear that the erroneous instruction did not and could not cause any prejudice to the Defendants or diminish their rights. See Williams, 299 F.3d at 257 ("An error affects the substantial rights of a party if it is prejudicial."). In particular, the Government's theory of the case was that the Defendants' conduct

perpetrated a financial fraud on the banks, resulting in an actual loss of more than $400,000, the approximate difference between the false sales price and the actual price, as well as the risk of loss. Moreover, the District Court properly instructed the jury that both the scheme to defraud, as well as the intent to defraud, had to be directed at the banks. Thus, in these circumstances, we do not believe that a single erroneous jury instruction as to intangible rights could have been a possible basis for the jury's verdict. See United States v. Saks, 964 F.2d 1514,1522 (5th Cir. 1992) (finding no plain error where erroneous intangible rights instruction given to jury because government did not rely on or present evidence in support of an intangible rights theory); United States v. Perholtz, 836 F.2d 554, 558-59 (D.C. Cir. 1987); cf. United States v. Holley, 23 F.3d 902, 910-11 (5th Cir. 1994).

F. Co-schemers' liability

The District Court instructed the jury, in accordance with the Government's request and over the Defendants' objection, as follows:

> I further instruct you, members of the jury, that you may consider acts knowingly done and statements knowingly made by the defendants [sic] co-schemers during the existence of the scheme, and in furtherance of it as evidence pertaining to the defendants, even though they were done or made in the absence of and without the knowledge of the defendants.
>
> *This includes acts done or statements made before the defendants had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing scheme, is*

> *responsible for all of the conduct of the co-schemers from the beginning of the scheme.*
>
> Acts and statements which are made before the scheme began or after it ended are admissible only against the person making them, and should not be considered by you against any other defendant.

App. at 2142-2143a (emphasis added). The Defendants contend that the highlighted instruction – permitting the jury to attribute acts and statements of a co-schemer to a defendant made prior to the defendant's entry into the scheme – was in error.

While we have addressed the circumstances in which the jury may be instructed that the acts and statements of a co-conspirator may be attributed to a defendant for purposes of determining guilt of the substantive offense, see United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001) (citing Pinkerton v. United States, 328 U.S. 640, 647 (1946)), we have apparently not yet addressed the circumstances in which a co-schemer instruction may be properly given. We note, however, that the Ninth Circuit has addressed co-schemers liability in some detail. See, e.g., United States v. Lothian, 976 F.2d 1257, 1262-63 (9th Cir. 1992); United States v. Stapleton, 293 F.3d 1111, 1117 (9th Cir. 2002). In particular, in a federal mail and wire fraud proceeding, the Ninth Circuit explained: "Just as acts and statements of co-conspirators are admissible against other conspirators, so too are the statements and acts of co-participants in a scheme to defraud admissible against other participants. We also apply similar principles of vicarious liability. Like co-conspirators, 'knowing participants in the scheme are legally liable' for their co-schemers use of the mails or

wires." Stapleton, 293 F.3d at 1117 (quoting Lothian, 976 F.2d at 1262-63). Nevertheless, under the approach of the Ninth Circuit, the District Court's instruction in this case may well have been erroneous to the extent that it permitted the jury to consider acts and statements of a co-schemer performed prior to the defendant's entry in the scheme. See Stapleton, 293 F.3d at 1117 ("The acts for which a defendant is vicariously liable must have occurred during the defendant's knowing participation or must be an inevitable consequence of actions taken while the defendant was a knowing participant.").

However, assuming arguendo that the Ninth Circuit's approach is correct, which we need not decide, any error here was harmless on the facts of this case. Cf. United States v. Simon, 995 F.2d 1236, 1244-45 (3d Cir. 1993).[16] Simply put, on the facts of this case, there was no possibility that the jury could have attributed the acts or statements of one co-schemer to another defendant that were made prior to the

[16] For purposes of harmless error review, in Simon, we noted that erroneous jury instructions which are properly objected to may be characterized as constitutional or non-constitutional in nature. For non-constitutional errors, we have held that "unless the appellate court believes it is highly probable that the error did not affect the judgment, it should reverse." Simon, 995 F.2d at 1244 (quotation and citation omitted). By contrast, for constitutional errors, "the test is whether the evidence is so overwhelming that it is beyond reasonable doubt that the verdict would have been the same had the error not been committed." Id. at 1245 (internal quotation and citation omitted). Here, we need not decide whether the co-schemers' instruction, assuming it was erroneously given, should be subject to constitutional or non-constitutional review as we would arrive at the same conclusion under either test. Id.

defendant's entry into the scheme to defraud. The Indictment charged that the scheme to defraud began in at least March 1993. Moreover, Edward Stigben, a co-schemer with the Defendants, testified at trial that the Defendants were involved in the scheme to defraud since at least 1991 or 1992. See App. at 447a, 451a. Moreover, the Government did not present evidence of a scheme to defraud existing prior to the Defendants' involvement. Thus, as there was no evidence of a prior scheme, the jury could not have attributed a co-schemer's acts or statements to the Defendants prior to the Defendants' entry into the scheme. Accordingly, any error in the District Court's instructions was harmless.

IV. SUFFICIENCY OF THE EVIDENCE

The Defendants contend that there was insufficient evidence to sustain their bank fraud convictions on at least two grounds: first, that there was no evidence that the banks suffered any loss as a result of the scheme to defraud and, second, that there was no evidence that they had any intent to defraud the banks as opposed to the banks' customers, the debtors from whom the cars had been seized. "[A] claim of insufficiency of the evidence places a very heavy burden on the appellant." United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998). We must "view the evidence in the light most favorable to the government, and will sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See id. (citations and quotations omitted). After reviewing the record in this matter, we conclude that there was sufficient evidence to sustain the Defendants' convictions.

A. Evidence of loss by the banks

As explained above, § 1344 requires that the fraudulent scheme exposed the bank to some type of loss. E.g., Khorozian, 333 F.3d at 504-05. As an initial matter, we note that the loss or liability that must be caused by the scheme to defraud can either be an actual loss by the bank, or it can be a potential loss, what we termed in Khorozian the "risk of loss." Id. Nor is a financial loss the only cognizable injury under the bank fraud statute: we have recognized that exposing a bank to civil liability is sufficient under the bank fraud statute. See id. at 505 n.5 (noting that the UCC makes a bank liable to a drawer of a check if it pays on a forged indorsement). On the record before us, and viewing the evidence in the light most favorable to the Government, there is sufficient evidence to support the finding that the Defendants' conduct exposed the banks to a risk of loss.

In particular, by not returning the full sale price of the automobiles to the banks, the Defendants increased the amount of the deficiencies that the banks had to collect from the banks' customers indebted on the loans. One banker explained what was meant by deficiency: "[t]he balance [of the loan to the borrower] less the proceeds of the sale." App. at 2896a. Given that the banks were already dealing with customers who had defaulted on their loan obligations, a jury could readily infer that the Defendants conduct made it more likely that the banks would not be able to collect the full deficiencies.

Testimony at trial indicated that it was normal that after the auction of an automobile, a deficiency on the outstanding loan would still remain, and that it was rare for an auction to fetch a price sufficient to

cover the entire loan amount. Chris Mulvihill of Midlantic Bank explained: "[w]hat would happen is the customer would have a loan. The loan was generally more than the value of the car was for. We would sell the car. Whatever we got for the car, the customer had to pay that difference back." App. at 1113a. Similarly, Louis Credle of the Police and Fire Federal Credit Union testified that "[i]f we have to repo the car, then it goes to auction, and then we have a default balance . . . [.] [T]hat would be normal." App. at 233a. Another banker also noted that "on one or two rare occasions[,] a customer had so much equity in the car when we sold it, they ended up getting money back, so that doesn't happen all the time. But it's very rare." App. at 151a.

Because it was routine for the auction to yield a price insufficient to cover the amount of the outstanding debt, bank representatives testified that it was critical for the banks to get the best possible price so as to minimize the amount of the deficiency. For instance, one banker testified that his bank sent cars to the auction "to minimize our cost on [those] vehicle[s] so that we could attain a high value of return and cut our deficiency." App, at 88a. Another banker testified that, because each repossessed car was the subject of a loan, obtaining the highest price at auction meant that the bank "could eliminate the deficiency balance as much as possible" and "reduce the loss on that loan." App. at 2992a. Similarly, another banker testified that it was important for the bank to get the highest price possible at auction because lower prices increased the amount of the deficiency the bank faced, a balance that could ultimately have to be written off against the banks' reserves for loan losses. App. at 2883a, 2896a-97a; see

also App. at 1113a (testimony of bank representative that "we wanted to sell the cars for the most amount we could in order to reduce the bank's losses"). Once the cars had been auctioned, the banks typically looked to the customer for satisfaction of any deficiency balance. See App. at 2896a (testimony that following the auction, the bank attempts "to make arrangements for him [the customer] to pay the deficiency"). However, testimony at trial confirmed the obvious proposition that the customers from whom the cars had been repossessed, having failed once to pay their loan obligations, were unlikely to pay additional money towards satisfying any remaining deficiency. As one banker noted, it was important to get the best price because "most of the time [the customers] are not paying you." App. at 110a. Viewing the evidence in the light most favorable to the Government, a jury could readily infer that the Defendants' conduct, by increasing the amount of deficiency the banks had to pursue from their riskiest customers, exposed the banks to a risk of loss, i.e., the risk that the banks' customers would not be able to satisfy the greater deficiency balance.[17]

Not only did the Defendants' conduct expose the

[17] We also reject the Defendants' suggestion that because the banks retained a legal remedy against the borrowers to collect any outstanding deficiency, the banks could not be placed at a risk of loss. The fact that a bank has the ability to pursue a legal remedy to collect an unpaid deficiency against a debtor does not mean that, in every instance, it would have done so, as it would have to weigh the costs of litigating the deficiency claim versus the probability of a favorable outcome. See United States v. Autorino, 381 F.3d 48, 53 (2d Cir. 2004) (noting that the FDIC's protection against loss under the UCC was undermined by the costs of pursuing legal action).

banks to the risk of non-payment of a greater deficiency balance, the Defendants' conduct threatened to impair the banks' ability to pursue legal remedies against the deficiency debtors. Article 9 of the UCC requires a secured creditor to dispose of collateral in a "commercially reasonable" manner. See 13 Pa. Cons. Stat. § 9504 recodified at 13 Pa. Cons. Stat. § 9610; N.J. Stat. Ann. § 12A:9-504 recodified at N.J. Stat. Ann. § 12A:9-610. Indeed, bank representatives testified that selling the automobiles in a commercially reasonable manner was critical to preserving the bank's ability to seek a deficiency judgment in a subsequent proceeding against the automobile's owner. E.g., App. at 1113a ("We also wanted to be able to exercise a commercially reasonable sale, so that we could recover the deficiency balance for these cars."). The banks chose to consign the automobiles to Carriage Trade for auction precisely because they sought to comply with the requirements of state law. E.g., App. at 1114a ("We felt that [the auction was best] because of the fact that there were more bidders bidding on the car, that we would get a better price. These little lots that were selling the vehicles generally was a handful of people bidding on the cars, but literally hundreds of people attended the auctions. So the idea was to have more action, more people making bids on the car.").

However, the Defendants' conduct deprived the banks of the opportunity to dispose of their collateral in a "commercially reasonable" manner, thereby exposing the banks to a risk that they would be unable to pursue successful deficiency claims against their debtor customers. For instance, one bank representative noted that because all they had in their possession were the false bills of sale, which were

evidence that the cars were effectively bought by Carriage Trade for its own inventory at artificially low values, they would have difficulty in court in establishing a claim for a deficiency. See App. at 1125a ("We needed this documentation that the auction provided, as I stated earlier, in order to be able to collect the rest of the money that the customer may owe. And certainly if the same auction that the car was auctioned at had purchased the car, that would create a problem if we went to court and tried to get that money back."); App. at 1275a (noting that the false bills of sale in the banks' possession "didn't reduce our losses" but rather "increased our losses" because "if we had to go to court ourselves, if were suing someone on a deficiency, we'd have to have the bill of sale"); App. at 881a (noting that it was important to demonstrate that the car had been sold for the most money because it "showed that . . . it [the car] went to an auction where they [the customer] know you didn't give the car away, so to speak"); App. at 1113a-14a (noting that a "commercially reasonable" sale was important because "we were pursuing the customer for the rest of the money that was owed" and "we needed to be able to prove that we did the best job we could in selling the car"). Thus, the evidence supported a jury finding that the Defendants' conduct exposed the banks to a risk of loss in the sense that the disposition of the collateral could be found to be commercially unreasonable, thereby impairing the banks' ability to collect on any deficiency balances.

Despite the evidence of risk of loss to the banks caused by the scheme to defraud, the Defendants insist that the Government was required to introduce specific evidence as to each of the 311 cars that the banks in fact had a deficiency balance remaining

following Carriage Trade's remittance of the fraudulent sales price. In particular, the Defendants contend that because there is no evidence that the banks suffered any uncollected deficiencies as to the defaulted borrowers with respect to any of the 311 cars, the jury could not infer whether a bank was harmed by less than the full sale price the Defendants returned.[18] We reject the Defendants' argument because it conflates a showing of actual loss with the risk of loss. Evidence of uncollected deficiencies with respect to each of the 311 cars goes only to whether the banks suffered an actual loss, in fact, on the deficiency balance; to the extent that some banks may have successfully collected the higher deficiency balances from the borrowers does not negate the fact that the Defendants' conduct exposed the banks to a risk of loss, i.e., the threat of non-payment by the bank's riskiest customers as well as the impairment of the banks' legal remedies to collect on the deficiencies. See Khorozian, 333 F.3d at 505 n.6 ("That Hudson United never actually suffered harm is also immaterial to Khorozian's defense. Section 1344 only requires that the bank be placed at risk of loss."); Monostra, 125

[18] One of the 311 cars was a 1994 Toyota, on which Midlantic Bank was owed $14,102.49 on the loan by the car's legal owner and debtor. The car was improperly sold by Defendants to Carol Leahy for $18,000, and Carriage Trade still paid $14,184 to Midlantic Bank, which was greater than the remaining loan obligation. In other words, Midlantic Bank recovered all of its debt and was made whole with respect to this automobile. There was, according to the Defendants, no actual loss suffered by Midlantic Bank as a result of their conduct. Extrapolating from this example, the Defendants contend that there was no evidence introduced by the Government that, with respect to the vast majority of the cars, the banks suffered any loss.

F.3d 183 at 188 ("As we have noted in the past, the government need not show that the banks actually incurred a loss in order to prove a scheme or artifice to defraud. Exposure to potential loss is sufficient."). The evidence of the loan balances with respect to the 311 cars is irrelevant to showing a risk of loss. The fact that the Defendants' scheme to defraud may have fortuitously failed to impede the banks' ability to collect on some of the deficiencies does not mean that the scheme did not involve a risk of loss to the banks.[19]

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[19] In addition to risk of loss, the Government argues that the Defendants' fraudulent scheme exposed the banks to an actual loss in the amount of $418,657, the total difference pocketed by the Defendants between the low sale price reported to the banks and the actual sale price received by Carriage Trade. The Defendants, however, contend that the $418,657 did not represent the actual loss to the banks as the money properly belonged to the owners of the automobiles, not the banks. In particular, the Defendants rely extensively on Article 9 of the Uniform Commercial Code ("UCC") governing secured transactions and as adopted in Pennsylvania and New Jersey, which rests title of repossessed automobiles in the individual owners of the cars, not the banks. Because the banks were not the legal owners of the 311 automobiles in question, the Defendants argue that the $418,657 was money that was taken from the legal owners of the automobile, and not the banks. However, we need not reach this argument because we have found sufficient evidence to support a risk of loss to the banks.

We do note that we are unpersuaded by the Defendants' criticism of the Government's statements at trial and in its brief to this Court that the "[t]he cars did not belong to Carriage Trade, they belonged to the banks." E.g., Gov't Br. at 49. As the Defendants correctly note, under the UCC as adopted in Pennsylvania and New Jersey, the banks were not legal title holders of the cars, but rather priority lien holders. That said, the Government's statement that the cars "belonged to the banks," as opposed to the cars' legal owners or Carriage Trade,

(footnote continues)

Finally, the Defendants contend that not every bank representative testified with sufficient clarity that his or her particular bank was exposed to any risk of loss as a result of the scheme to defraud. We disagree. Viewing the evidence in the light most favorable to the Government, there was sufficient evidence for a jury to infer that each bank faced a comparable risk of loss from the Defendants' fraudulent scheme. Certainly, there is no requirement that each bank representative had to testify using the magic words "risk of loss" to support a jury's finding to this effect. The Government's evidence, taken as a whole, was sufficient to support a jury finding of a risk of loss as to each bank.[20]

(footnote continued)
can hardly be claimed to be erroneous. Indeed, the banks had lawfully repossessed the automobiles from individuals who had defaulted on their loan, and, accordingly, the banks' interest in the automobiles was far superior to any interest that the cars' owners had remaining after repossession. This is particularly true given that that banks had the right to dispose of the cars as collateral for their loans pursuant to "commercially reasonable" procedures. See 13 Pa. Cons. Stat. § 9504 recodified at 13 Pa. Cons. Stat. § 9610; N.J. Stat. Ann. § 12A:9-504 recodified at N.J. Stat. Ann. § 12A:9-610.

[20] To avoid any confusion, we note that our decision not to discuss whether the banks suffered an actual loss as a result of the Defendants' scheme should not be read as suggesting that no such loss in fact occurred. Because we are vacating the Defendants' sentences, on remand the District Court will have the opportunity to determine whether the banks suffered an actual loss, and the amount of that loss, for purposes of the Guidelines as well as restitution. We note that the proof of actual loss for purposes of the bank fraud conviction is not the same as proof of loss for purposes of calculating "loss" under the Guidelines or for restitution, a point which we consider in more detail in Part V.

B. Evidence of an intent to defraud the banks

The Defendants contend that there was insufficient evidence to support a finding that they had an intent to defraud the banks, as opposed to the banks' customers, the debtors on the car loans. We disagree.

Testimony at trial permitted the jury to infer that the Defendants knew their conduct was fraudulent and deceptive toward the banks and could cause loss to the banks. For instance, most of the bank representatives testified that they never gave the Defendants permission to purchase the cars for their own inventories, and several bank representatives testified that they affirmatively prohibited Defendants from purchasing the cars for themselves. E.g., App. at 1155 (banker testified that he told the Defendants numerous times "that they weren't allowed to purchase the cars"). As one banker explained, the reason why the banks did not authorize Carriage Trade to purchase the cars for its own inventory, despite several such requests, was that a direct sale to Carriage Trade did not involve "competitive bidding" and "[w]ithout competitive bidding, you really can't establish a proper deficiency." App. at 1262a.

Moreover, evidence at trial indicated that Carriage Trade held itself out as an auction service able to obtain the best prices for the automobiles in the quickest and most efficient manner. To a large extent, the banks relied on Carriage Trade to value the cars for purposes of resale in a manner that would fetch the best price. As one bank representative testified, "we had no idea of knowing what the condition [of the cars] was. We never saw the cars. And . . . we never went to the auction so we had no idea what the cars looked

like. So we put our trust in them informing us of what the condition was, which was pretty much how they based the value of the car." App. at 209a. Another banker testified: "I was pretty much a layperson. What I know is that these people knew more than me. I was relying heavily on them. They were in the business. They were the professionals. They were telling me they were getting the best prices for the car." App. at 1194a-95a; see also App. at 2821a (in opening statement, Government argued: "[i]t was the defendants who held themselves out as being experts on putting value on these cars so that they could be sold for the most money. Then the bank could put that money toward the outstanding loan."). From such evidence, a jury could find that the Defendants knew they were under an obligation to obtain the highest price for the cars and that failure to do so would violate their agreements with the banks. Moreover, the Defendants' argument that they lacked an intent to defraud the banks based on the fact that they returned to the banks the "minimum floor" price set by the banks for each of the 311 cars misses the point. The banks clearly had an expectation, as the Defendants must have known, that if a car was sold above the minimum floor, the banks, not Carriage Trade, should receive the difference.

The Defendants, however, contend that the Government argued to the jury that their fraudulent scheme injured not only the banks but also the banks' customers, the debtors on the 311 cars. By arguing that the debtors were the victims of the scheme, the Defendants argue that the Government violated Thomas, which requires that the banks be the intended victim of the bank fraud, as opposed to some third party. However, we have already explained

earlier in Part III.A why Thomas's "intent to victimize" language is inapplicable to this case, as Khorozian makes clear that no "intent to victimize" is required where the bank is the direct target of the deceptive conduct. In any event, it is well-established that a bank need not be the sole or immediate victim of the fraud. See *Moran*, 312 F.3d at 489 (citation omitted), cited in Khorozian, 333 F.3d at 505; United States v. McNeill, 320 F.3d 1034, 1037 (9th Cir. 2003); Brandon, 298 F.3d at 311 (citation omitted); Crisci, 273 F.3d at 240. So long as the defendant had an intent to defraud the bank, and the bank suffered loss or risk of loss as a result of the deceptive conduct, § 1344 is implicated even if a third party is also injured as a result of the fraudulent conduct. See also McNeill, 320 F.3d at 1037 (noting that defendant's deception "was plainly directed at First Interstate Bank as well as at the IRS, and the scheme to deceive the bank was essential to McNeill's overall plan. Thus, the bank was not merely an unwitting instrumentality of a scheme to defraud the IRS, it was also a victim of [defendant's] deception."); Crisci, 273 F.3d at 240 (holding that defendant "is not relieved of criminal liability for bank fraud because his primary victim was the employer from which he embezzled funds by submitting fraudulent check requests"). Even if the banks' customers were harmed as a result of the fraudulent scheme, there is still ample evidence that the Defendants' had an intent to defraud the banks within the meaning of Khorozian.[21]

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[21] We note in passing that we are unpersuaded by the Defendants' contention that the Government argued to the jury that the primary victim of the fraudulent scheme to defraud were the debtors as opposed to the banks. The Defendants pluck

(footnote continues)

V. SENTENCING ISSUES

The Defendants raise a number of arguments with respect to their sentences, including the District Court's application of several sentencing enhancements under the Guidelines; the District Court's calculation of loss for purposes of the Guidelines; and the District Court's imposition of forfeiture and restitution orders. The Defendants also contend that portions of their sentences violate the Eighth Amendment's Excessive Fines Clause. Finally, pursuant to Booker, which was decided while this matter was pending, Defendants assert that their Sixth Amendment rights were violated i) by the imposition of their sentences under the Guidelines and ii) by the District Court's imposition of forfeiture and restitution based on figures calculated by the court rather than by the jury or admitted by the Defendants.

Because the now-advisory Guidelines where mandatory at the time of sentencing, pursuant to

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(footnote continued)
statements from the record in isolation, without reference to context or the rest of the record. However, any suggestion that the Government argued this case on the theory that the borrowers were the victims of the bank fraud is belied by the extensive record in this case, which contains many examples of the Government's theory that the banks were the targets of the scheme and injured as a result of the scheme. As just one example, in its closing argument, the Government clearly argued that the banks were the intended targets of the deception and the injured party: "this is a very simple scheme. The defendants sent the banks false bills of sale, phony documents. They lied to the banks when they said that their [the banks'] cars had been sold at auction. They dummied up the paperwork to fake the sales, and then they sent the bank a check for the low phony purchase price." App. at 3042a.

Booker we will vacate the Defendants' sentences and remand for further proceedings. See Davis, 407 F.3d at 165. Our doing so eliminates the Eighth Amendment Excessive Fines issue, as to which we express no opinion. What remains is the Defendants' argument that, under Booker, Sixth Amendment protections apply to orders of forfeiture and restitution. Bound by recent Third Circuit precedent,[22] we hold that the Supreme Court's decision in Booker does not render the forfeiture and restitution ordered against the Defendants unconstitutional. Nonetheless, we will vacate the District Court's forfeiture and restitution orders so as to allow the District Court to alter the amounts in the event that there arises an inconsistency with the District Court's revised Guidelines loss calculation. Although we need not consider the Defendants' calculation of loss arguments on the merits because we have already resolved to vacate as to this issue, we endeavor below to provide some guidance on how to calculate loss for purposes of the Guidelines.

* * *

The District Court, over the Defendants' objections, found the loss to the victim banks caused by the fraudulent scheme to be $408,970, that is, $418,657 minus $4,687 for certain repair work performed on the cars by the Defendants minus $5,000 that Carriage Trade had paid to Midlantic Bank after its discovery of the fraud. The Defendants contend that the loss calculation was in error, particularly on the basis of our decision in United States v. Dickler, 64 F.3d 818, 824-26 (3d Cir. 1995) (holding that, under U.S.S.G. §

[22] See note 1, supra.

2Fl.1, a victim's loss should be calculated by estimation of the actual loss to the victim; "the defendant's gain may be used only when it is not feasible to estimate the victim's loss and where there is some logical relationship between the victim's loss and the defendant's gain so that the latter can reasonably serve as a surrogate for the former."). Because we will vacate the Defendants' sentences and remand for resentencing pursuant to Booker, we will not consider the Defendants' arguments in the first instance. However, we make certain observations in light of Dicker that the District Court should consider on remand.

We note that pursuant to the Federal Rules of Criminal Procedure, a district court "must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(d)(i)(3)(B) (2003). We have also previously noted that "[a] finding on a disputed fact or a disclaimer of reliance upon a disputed fact must be expressly made." United States. v. Electrodyne Sys. Corp., 147 F.3d 250, 255 (3d Cir. 1998); see also United States v. Cherry, 10 F.3d 1003, 1013 (3d Cir. 1993). In this matter, it is clear that there was a dispute between the asserted loss stated in the presentence report and relied on by the Government, and the loss amount put forth by the Defendants. However, having reviewed the District Court's oral decision at the loss hearing, we believe that the District Court has not resolved with sufficient particularity or specificity the disputes regarding the predicate factual elements for the loss calculation. For instance, we are unable to determine whether the

District Court reached the $408,970 figure by calculating the actual loss to the victim banks, or by using the Defendants' gain as a surrogate for the banks' loss. Dickler requires "some explanation of why an estimate of loss based on" the Defendants' data was not feasible. Id. at 827. Moreover, we are unable to determine whether the District Court considered the Defendants' two-market theory, or the basis on which the District Court rejected the Defendants' evidence in this regard.

Although the Government offers a spirited defense of the District Court's loss calculation, contending that the District Court found the Defendants' evidence of two markets as lacking in credibility and self-serving, on the record before us, we are not so sure of the basis of the court's ruling. For instance, the District Court stated that it found "the testimony of the witnesses presented [at the loss hearing], for the most part, lacked some credibility in relationship to the issues here." App. at 2385a. Moreover, the District Court stated that it found the $408,970 amount "to be an accurate and realistic valuation" of the 311 cars. App. at 2385a. What aspects of the factual record the court found credible and incredible is unclear, as is the basis of the District Court's conclusion that the loss amount was "accurate and realistic." Accordingly, on remand, the District Court has the opportunity to reevaluate the evidence to arrive at a satisfactory determination of the banks' losses. However, lest there be any misunderstanding, our decision should not be taken as prejudging the evidence or as compelling a conclusion that the Defendants' evidence must be credited, a task for which, in any event, the District Court is best suited.

VI. CONCLUSION

For the foregoing reasons, we will affirm the judgments of conviction of the District Court. However, we will vacate the Defendants' sentences and remand for further proceedings consistent with this opinion.

Becker, *Circuit Judge*, concurring and dissenting.

I join fully in Parts II, III.C, III.E, III.F, and V of the majority opinion. I join in Part III.D to the extent that it holds that the willful blindness instruction was justified as to Defendant Leahy and constituted harmless error as to Defendants Smith and Dantone, although I will note my reservations regarding the use of that instruction as to Dantone. I join in Part IV except to the extent that it conflicts with my analysis of the elements of bank fraud, set forth in detail below. I do not join in Parts III.A and B or in the judgment because I believe that the majority's resolution of the bank fraud and moral uprightness jury charge issues is incorrect. In particular, I think the majority's discussion of the elements of bank fraud is inconsistent with this Court's decision in *United States v. Thomas,* 315 F.3d 190 (3d Cir. 2002), a fair reading of which compels the conclusion that the jury instructions used here were erroneous.

I.

The majority finds that the jury instructions used in this case were consistent with our decision in *United States v. Thomas*, 315 F.3d 190 (2002), which interpreted the federal bank fraud statute. I disagree.

A.

The bank fraud statute reads:

Whoever knowingly executes, or attempts to

> execute, a scheme or artifice-
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. In *Thomas*, we held that subsection (2) of the statute cannot serve as an independent basis for conviction. Thus, a defendant cannot be convicted of bank fraud solely because he uses false pretenses to obtain money or property that is under the bank's custody but does not belong to the bank; rather, he must also act to "defraud the bank," thus subjecting him to liability under subsection (1). While we acknowledged that this conjunctive reading was in tension with the plain disjunctive language of the statute, we found that it was necessary to effectuate to the statute's purpose "'to protect the federal government's interest as an insurer of financial institutions.'" 315 F.3d at 200 (quoting *United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993)). As *Thomas* explained, if a defendant takes money that is under the bank's custody but does not belong to the bank, and in so doing does not subject the bank to any risk of losing its own funds, he has not threatened this interest and therefore has not committed bank fraud.

The District Court in this case, acting before our decision in Thomas was issued, instructed the jury that either subsection of the bank fraud statute could

serve as a basis for conviction. It stated:[23]

> The bank fraud law provides that whoever knowingly executes or attempts to execute a scheme or artifice, *one*, to defraud a federally chartered or insured financial institution, *or two*, to obtain any of the moneys, funds, credits, assets, security or other property owned by or under the control or custody of a financial institution by means of false or fraudulent pretenses, representations or promises, shall be guilty of the crime of bank fraud. . . .
>
> Members of the jury, the first element is that the government must prove beyond a reasonable doubt that there was a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representations or promises.

(emphasis added). Because the District Court instructed the jury that it could convict under *either* subsection of the bank fraud statute, it committed error under *Thomas*.[24]

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[23] Although *Thomas* was not yet decided when this case went to trial, defendants nonetheless properly objected to the District Court's instruction.

[24] I recognize the seeming perverseness of reversing a conviction because the District Court instructed the jury by reading excerpts from the relevant statute. But *Thomas* clearly stands for the proposition that the bank fraud statute is not to be given its plain meaning.

The majority does not dispute that the above language, standing alone, is inconsistent with *Thomas*. But it argues that the District Court's error is saved by a later portion of the charge: "The intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property." Maj. Op. at 13-14. This instruction, the majority argues, precluded the jury from convicting solely on the basis of subsection (2).

I respectfully disagree. First, the intent instruction was an isolated one, preceded and succeeded by the disjunctive language quoted above. Indeed, when the jury later requested that the District Court repeat the elements of bank fraud, the Court again instructed the jury that it could convict under either subsection of the statute and failed to repeat the sentence setting forth the intent standard.[25] Rather, it simply instructed the jury that it could convict if it found that the defendants acted "with the intent to defraud," not, as we required in *Thomas*, "with the intent to defraud *the bank*." See 315 F.3d at 197.

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25 The jury asked, "Can we have the criteria for bank fraud again, please?" The District Court responded, in pertinent part:

> To prove a charge of bank fraud the defendant [sic] must establish each of the following elements beyond a reasonable doubt. First, that the defendants knowingly executed a scheme or artifice to defraud a financial institution, *or* a scheme or artifice to obtain any of the money owned by or under the custody or control of a financial institution by means of false or fraudulent pretenses, representations, or promises.

Second, that the defendants did so with the intent to defraud. . . . (emphasis added).

Second, the intent instruction simply did not preclude the jury from convicting solely on the basis of subsection (2). As we held in *Thomas*, a defendant who deceives a bank in order to obtain from it money or property belonging to a third party (but in the custody of the bank) does not commit bank fraud, unless he also knowingly subjects the bank itself to a loss or risk of loss. But he could easily have been convicted under these instructions, which stated that "[t]he intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property."

What these instructions lack is the critical element of bank fraud identified in *Thomas*: namely, that the defendant must have the intent "to victimize the bank," *see* 315 F.3d at 198, 200, either by taking the bank's own funds or by putting the bank at a risk of future loss or liability. As we held in *Thomas*, "Congress sought to proscribe conduct that 'victimize[d]' banks, which suggests that the bank must be deliberately harmed before the statute is violated. We believe that, given the legislative intent, harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud." *Id.* at 200. By not requiring such an intent, the instructions permitted the jury to convict under subsection (2) of the statute.

As *Thomas* made clear, "the intent to defraud the bank" requires more than merely "an intent to deceive the bank in order to obtain from it money or other property." *See* 315 F.3d at 200 ("The Government also suggests that mere 'deceptive conduct' toward the bank establishes intent to defraud. We disagree."). Indeed, Thomas herself had the "intent to deceive the bank in order to obtain from it money or other

property,"[26] but we held that she did not have the "intent to defraud the bank," which, again, requires an intent to "victimize" the bank by exposing it to a loss or risk of loss. Thus Thomas could have been convicted under these jury instructions, even though, as we held in that case, she did not commit the crime of bank fraud. This fact alone should be sufficient to demonstrate that the jury instructions in this case were flawed.

B.

The majority makes an additional argument in order to justify the jury instructions used in this case. According to the majority, the *mens rea* requirement set forth in *Thomas* only applies to *some* bank fraud. Other types of bank fraud—such as that committed by the defendants in this case—are not subject to *Thomas*'s *mens rea* requirement.

The majority justifies its effort to cabin *Thomas* by arguing that a later decision of this Court, *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003), created a distinction between those cases that "involved fraud on a third party where the bank was merely an 'unwitting instrumentality' in the fraud" and those in which the bank was itself the "target of deception." According to the majority, only in the former case, where the bank is merely an "unwitting

[26] *See* 315 F.3d at 195 ("As Thomas admits in her confession, her crime involved a pattern of activity intended to deceive others, including acquiring [her victim's] trust, making deceptive misrepresentations to her, and some to the bank."). Moreover, the goal of her scheme was to obtain money from the bank, even though the money in question belonged to her elderly victim.

instrumentality," do we require "the additional requirement of proof of an 'inten[t] to cause a bank a loss or potential liability.'" Maj. Op. at 19 (alteration in original). The majority argues that in cases where the bank itself was the "target of deception," "proof of a specific intent to defraud the bank plus fraudulent conduct (e.g., misrepresentations) which creates an actual loss or a risk of loss." Maj. Op. at 18. In such cases, according to the majority, proof of an actual intent to cause the bank a loss or risk of loss is not required.

The argument is flawed for several reasons. First, it fails on its own terms. The jury in this case was never required to find that the conduct of the defendants "exposed the bank to . . . loss." Maj. Op. at 36. Thus, even if the majority's legal standard were correct, the jury instructions were insufficient.

Second, I do not read *Khorozian* in the same way as the majority. In fact, I read *Khorozian* as being entirely faithful to *Thomas*. *Khorozian* simply stands for the proposition that the intent to put the bank at a risk of loss is sufficient to violate the bank fraud statute, even if there was no intent to cause an actual loss. Indeed, we affirmed the jury instructions in *Khorozian* because they "clearly instructed the jurors that they needed to find specific intent to defraud in order to convict." 333 F.3d at 508-09. Thus, nothing in *Khorozian* modified Thomas's core holding that, in order to be convicted of bank fraud, a defendant must act with the intent to defraud the bank.

To be sure, *Khorozian* found *Thomas* and other cases to be "factually distinguishable because [they] involved fraud on a third party where the bank was merely an 'unwitting instrumentality' in the fraud

rather than the 'target of deception.'" *See* 333 F.3d at 505. The majority concludes that this statement modified the mens rea requirement for bank fraud as set forth in *Thomas*. I disagree. Again, the key issue in *Khorozian* was whether the intent to cause a risk of loss to the bank was sufficient to convict under the bank fraud statute. The above language from *Khorozian* simply stands for the proposition that, in cases in which a bank is that "target of deception," it is perfectly reasonable for a jury to infer the requisite intent absent direct evidence.

It is for this reason that I join the majority's conclusion that the evidence in this case was sufficient to support a conviction. But whether the evidence is sufficient to justify a conviction (which was the issue in the portion of *Khorozian* relied on by the majority) is a very different question from whether the jury instructions communicated the proper legal standard. The answer to the latter question is controlled by our decision in *Thomas*, and I therefore conclude that the District Court's instructions were in error.

Furthermore, the majority's reading of *Khorozian* is clearly foreclosed by *Thomas*. In *Thomas*, we held that a bank can be a "target of deception" and still not be a victim of bank fraud if the defendant does not act with the requisite *mens rea*. As we stated in that decision:

> [*United States v. Laljie*, 184 F.3d 180 (2d Cir. 1999)] illustrates the kind of distinction we make between schemes which victimize banks by exposing them to liability or loss, and schemes in which banks, *despite being the target of deception*, are mere "unwitting

instrumentalities" to the fraud.[27]

315 F.3d at 201 (emphasis added). In the same vein, the Court also stated, "Our holding that the statute is to be read conjunctively does not end this matter. We must still decide the thorny question of what is meant by the subsection (I) requirement that the defendant intends to defraud the bank. . . . The Government also suggests that mere "deceptive conduct" toward the bank establishes intent to defraud. We disagree." 315 F.3d at 199-200.

Again, it is clear that the *Thomas* Court saw the bank in that case as a "target of deception," as the defendant deceived the bank as to the purpose of the checks she sought to cash.[28] In fact, *Thomas* held that, unless a bank is the target of the scheme, the defendant cannot be convicted of bank fraud at all. *See id.* at 198 ("[I]n order to prove bank fraud, a bank must be more than a mere incidental player. A defendant must have deliberately targeted his or her scheme at the banking institution."). So while the majority today holds that a defendant can be convicted of bank fraud if *either* he targets his scheme at the bank *or* he acts with intent to cause the bank a loss or risk of loss,

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[27] It was this language from *Thomas* that *Khorozian* relied on in observing that *Thomas* and other cases were "factually distinguishable because [they] involved fraud on a third party where the bank was merely an 'unwitting instrumentality' in the fraud rather than the 'target of deception.'" 333 F.3d at 505. This statement from *Khorozian* appears to rests on an erroneous reading of the above language from *Thomas*. At all events, *Khorozian* did not change the *mens rea* requirement for bank fraud, which was clearly set out in I.

[28] For this reason, any suggestion that we can simply ignore the problematic language in *Thomas* as dicta is misguided.

Thomas, on which the majority's analysis purportedly rests, held that the defendant must *both* target his scheme at the bank and intend to cause the bank a loss or risk of loss.[29]

Thus, the majority's statement that *Khorozian* holds that "intent to cause risk of loss" is not required, Maj. Op. at 20, cannot be correct. This view is directly contrary to *Thomas*' clear command: the defendant must intend to cause harm or loss to the bank. *Thomas*, 315 F.3d at 200. If the majority's reading of *Khorozian* were correct, then that decision would constitute an impermissible attempt to overrule *Thomas*, and, under Third Circuit Internal Operating Procedure 9.1, *Thomas* would remain the law of this Circuit. *See 0.Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981) (holding that, to the extent a later decision conflicts with an earlier decision, the later decision "must be deemed without effect.").[30] Thus, if the majority is correct and *Khorozian* conflicts with *Thomas*, then *Thomas*, not *Khorozian,* would prevail. Either way, the jury must find intent to cause the bank a loss or risk of loss.

The majority's reliance on *United States v. Moran*,

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[29] That *Thomas* held that merely causing a loss or risk of loss is not sufficient is made clear near the end of the opinion:

> Moreover, even were there a colorable case for civil liability set forth here, it must also be shown that Thomas intended to victimize the bank. Even a scheme which does expose a bank to a loss must be so intended.

315 F.3d at 202.

[30] Indeed, in questioning our assertion that *Khorozian* can be read as being faithful to *Thomas*, Maj. Op. at 20, the majority comes close to suggesting that *Khorozian* did overrule *Thomas*.

312 F.3d 480, 489 (1st Cir. 2002), *see* Maj. Op. at 17, is also misplaced. No matter what a different Circuit has held, the *Khorozian* panel was bound by our prior decision in *Thomas*.[31] Moreover, in *Moran*, the First Circuit stated that the defendant acted "with a clear motive to secure a financial windfall at the bank's potential expense." *Id.* at 491. Thus, *Moran* does not hold, as the majority suggests, that a defendant need only intend to make misrepresentations to the bank. *See* Maj. Op. at 17 (citing *Khorozian*, 333 F.3d at 505). The defendant in *Moran* did more than make misrepresentations to the bank: he acted with the intent to harm the bank by exposing it to a risk of loss.

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[31] The majority goes so far as to claim that "it is well-established that the 'intent to defraud the bank' element of § 1344 may be defined as 'an intent to deceive the bank in order to obtain from it money or other property.'" Maj. Op. at 15 n.8. In support of this supposedly "well-established" principle, the majority does not cite a single case that is controlling in this Circuit. *See id.* (citing *United States v. Moran*, 3 12 F.3d 480,489 (1st Cir. 2002); *United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002); *United States v. Lamarre*, 248 F.3d 642, 649 (7th Cir. 2001); *United States v. Hanson*, 161 F.3d 896,900 (5th Cir. 1998). What *is* "well-established" in this Circuit is our decision in *Thomas*, which held that "a defendant must intend to cause a bank a loss or potential liability, whether by way of 'statutory law, common law, or business practice.'" 515 F.3d at 201 (citation omitted). Given the unusual nature of our holding in *Thomas*—that a facially disjunctive statute is to be read in the conjunctive—it is not surprising that other courts would disagree. But the fact of their disagreement does not render *Thomas* any less valid. And none of the cases cited by the majority was decided by a court that reads § 1344 in the disjunctive. *See United States v. Kenrick*, 221 F.3d 19, 30 (1st Cir. 2000) (reading § 1344 in the disjunctive); *United States v. Moede*, 48 F.3d 238, 241 n.4 (7th Cir. 1995) (same); *Brandon*, 298 F.3d at 311 (same); *Hanson*, 161 F.3d at 900 (same).

C.

Finally, this error was not harmless. *See Gov't of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976) (holding error harmless if "it is highly probable that the error did not contribute to the judgment"). On the record, I cannot find that high probability. I acknowledge that in *Neder v. United States*, 527 U.S. 1, 18 (1999), the Supreme Court found it was harmless error for the jury instructions to have omitted an element of the criminal offense where the "omitted element is supported by uncontroverted evidence." That is not this case here. Indeed, at several points the government argued to the jury that the real victims of the defendants' actions were the banks' customers.

For these reasons, albeit reluctantly, I would set aside the convictions and remand for a new trial.

II.

The majority rightly acknowledges the dangers inherent in using the standard of "moral uprightness and fairness" to define fraud in a jury instruction. While noting the concerns trenchantly expressed in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002), the majority nevertheless upholds the charge in this case because "the instructions, taken as a whole, properly instructed the jury as to the proof required to establish a 'scheme to defraud' as well as the appropriate intent to defraud. . . . The jury could not have convicted the defendants merely for failing to adhere to standards of moral uprightness or fundamental honesty." Maj. Op. at 25.

In my view, the standard of "moral uprightness" has no place in jury instructions defining fraud, as it broadens the federal fraud statute in a manner that

"give[s] inadequate notice of criminality and delegate[s] to the judiciary impermissibly broad authority to delineate the contours of criminal liability." *Panarella*, 277 F.3d at 698. Moreover, I am unpersuaded by the fact that *Khorozian*, 333 F.3d at 508-09, upheld an instruction which defined fraud as "a departure from basic honesty, fair play, and candid dealings." *Khorozian* approved of this instruction after viewing the charge as a whole and determining that the instructions were clear that specific intent to defraud must be found to convict.

In affirming the District Court's reference to moral uprightness, the majority cites to *United States v. Dobson*, 419 F.3d 231 (3d Cir. 2005). *See* Maj. Op. at 26. In *Dobson*, a mail fraud case, the District Court instructed the jury that a scheme to defraud under 18 U.S.C. § 1341 is defined as "a departure from fundamental honesty, moral uprightedness, or fair play and candid dealings in the general light of the community." *Id at 239.* We reversed the defendant's conviction, finding that the instructions, taken as a whole, were inadequate. We stated in passing that the reference to moral uprightness was not itself objectionable, but this brief mention of moral uprightness provides virtually no support for the majority's position because (1) the statement was pure dicta; (2) the panel was applying plain error analysis; (3) the issue was not briefed by the litigants; and (4) the panel mentioned the issue in a passing reference, without any discussion or analysis.

I disagree that the jury instructions were so innocuous in this case. We, of course, do not look to portions of the instructions in isolation, and must consider them in their totality. *See United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995). In my view,

however, the notion of "moral uprightness"—missing from the instructions used in *Khorozian*—was central to the definition of fraud in the jury instructions in this case, and thus I fail to see how the remainder of the instructions cures this problem, or how it could be considered harmless error under the applicable high probability standard.[32]

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32 I agree with the majority that the willful blindness instruction was not erroneous as to Leahy, and that, while in error, the instruction was harmless as to Smith. *See* Maj. Op. at 30-31 n. 15. My only concern with the majority's discussion of this point is that the majority concludes that the instruction—which permitted the jury to infer that the element of knowledge could be inferred based on proof that "a *defendant* deliberately closed his eyes"—was justified primarily by the behavior of an individual who was not a defendant. The majority approves of the charge because there was evidence that Dominic Conicelli, Sr., the sole shareholder and president of Dantone, Inc., was willfully blind to the conduct of his employees. Conicelli's knowledge was certainly relevant to the question whether Dantone's employees committed bank fraud "within the scope of their employment" such that the corporation could also be convicted. But the jury instruction referred specifically to a "*defendant*'s knowledge of a fact." The jury could reasonably have assumed that the instruction was only intended to apply to the individual defendants. Thus, to the extent it was justified based on Conicelli's conduct, the willful blindness instruction was unnecessarily vague. Nevertheless, I conclude that any error resulting from the instruction was harmless. *See* Maj. Op. at 30-31 n.15.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4490/4542/4560

UNITED STATES OF AMERICA

v.

PAUL J. LEAHY
Appellant in No. 03-4490

UNITED STATES OF AMERICA

v.

TIMOTHY SMITH
Appellant in No. 03-4542

UNITED STATES OF AMERICA

v.

DANTONE, INC.
Appellant in No. 03-4560

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 01-cr-00260-2)
District Judge: Honorable J. Curtis Joyner

Argued June 8,2005

Before: FUENTES, VAN ANTWERPEN, and
BECKER, Circuit Judges.

ORDER AMENDING OPINION

The concurring and dissenting opinion filed on March 22, 2006, in the above referenced case is amended as follows:

> The word "disjunctive" in the fourth line of the continued footnote on page 75 should read "conjunctive".

By the Court:

/s/ Edward R. Becker
Circuit Judge

Dated: March 28, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4560

UNITED STATES OF AMERICA

v.

DANTONE, INC.

Appellant in No. 03-4560

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cr-00260-2)
District Judge: Honorable J. Curtis Joyner

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and BECKER*, Circuit Judges

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The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

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*Judge Becker's vote is limited to panel rehearing only.

and a majority of the circuit judges of the circuit in regular service not having vote for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M., Fuentes
Circuit Judge

DATED: April 20,2006

CLC\cc: Ian M. Comisky, Esq
Mary E. Crawley, Esq.
Joshua L. Dratel, Esq.
Robert A. Zauzmer, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-4490/4542/4560

UNITED STATES OF AMERICA

v.

PAUL J. LEAHY

Appellant in No. 03-4490

UNITED STATES OF AMERICA

v.

TIMOTHY SMITH

Appellant in No. 03-4542

UNITED STATES OF AMERICA

v.

DANTONE, INC.

Appellant in No. 03-4560

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 01-cr-00260-2)
District Judge: Honorable J. Curtis Joyner

Argued June 8, 2005

Before: FUENTES, VAN ANTWERPEN, and
BECKER, Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on June 8, 2005.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgments of conviction are AFFIRMED. The judgments of sentence are VACATED and this matter is REMANDED for further proceedings consistent with this opinion. All of the above in accordance with the opinion of the Court.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: March 24, 2006

No. 03-4542

UNITED STATES OF AMERICA.

v.

TIMOTHY SMITH,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable J. Curtis Joyner
(D.C. No. 01-cr-00260-1)

No. 03-4560

UNITED STATES OF AMERICA,

v.

DANTONE, INC.,
T/A CARRIAGE TRADE AUTO AUCTION,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable J. Curtis Joyner
(D.C. No. 01-cr-00260-3)

No. 04-2912

UNITED STATES OF AMERICA,

v.

KENNARD GREGG,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

District Judge:
Honorable John R. Padova
(D.C. No. 04-cr-00103)

Argued: November 1, 2005
Before: SCIRICA, Chief Judge, SLOVITER, ALITO*, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH,FISHER, VAN ANTWERPEN, ROSEN** and BECKER Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on November 1, 2005.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgments of the District Court entered as to the issues of forfeiture

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*Then Judge, now Justice, Alito was on the panel for this case but was elevated to the United States Supreme Court on January 30, 2006. This opinion is filed by quorumm of the panel. 28 U.S.C. § 46(d).

**Judge Rosenn heard oral argument on this case, but passed away on February 7. 2006

and restitution be, and the same hereby are, AFFIRMED.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: February 15, 2006 Clerk

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

May 1, 2006

Nos. 03-4560 & 034490

USA

v.

Paul J. Leahy,
Appellant (03-4490)

USA

v.

Dantone, Inc.,
Appellant (03-4560)

E.D. of PA (D.C. Nos. 01-cr-00260-2 & 01-cr-00260-3)

Present: FUENTES, VAN ANTWERPEN and BECKER, Circuit Judges

Unopposed Motion by Appellants to Vacate Judgment filed on February 15, 2006 and Request for Expedited Consideration.

/s/ Charlene Crisden
Case Manager 267-299-4923

ORDER

The foregoing motion is granted.

By the Court,

/s/ Julio M. Fuentes
Circuit Judge

Dated: May 16,2006

CLC\cc: Robert E. Welsh Jr., Esq.
Mary E. Crawley, Esq.
Ian M. Comisky, Esq.
Joshua L. Dratel, Esq.
Robert A. Zauaner, Esq.

The restitution provisions of the Victim and Witness Protection Act, 18 U.S.C.A. § § 3663 and 3664 (1992), provide as follows:

§ 3663. Order of restitution.

(a)

(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472)[49 U.S.C.A. § 1472], may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under

subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make

restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)

(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)

(1) The court may require that such defendant make restitution udner [sic] this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining

whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced—

(1) by the United States—

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title [18 U.S.C.A. § § 3611 et seq.]; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

§ 3664. Procedure for issuing order of restitution.

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation

service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.